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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 774

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY,
Respondent.

B. A. TURNER, ET AL., and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,
Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

HAROLD C. HEISS,
RUSSELL DAY,
HEISS, DAY & BENNETT,
622 Keith Building,
Cleveland, Ohio 44115,

ROBERT E. HOGAN,
1906 Kentucky Home Life Bldg.,
Louisville, Kentucky 40202,

ALEX ELSON,
WILLARD J. LASSERS,
AARON S. WOLFF,
ELSON, LASSERS AND WOLFF,
11 South La Salle Street,
Chicago, Illinois 60603,

HERBERT L. SEGAL,
SEGAL, ISENBERG, SALES AND STEWART,
1010 Republic Building,
Louisville, Kentucky 40202,

Counsel for Petitioners.

November 26, 1968.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioners pray that a writ of certiorari issue to the United States Circuit Court of Appeals for the Sixth Circuit to review a judgment of August 28, 1968 affirming judgments in two related actions in the United States District Court for the Western District of Kentucky at Louisville.

OPINION BELOW.

The opinion of the Sixth Circuit (A-1 herein) is reported in 490 F. 2d 572.

JURISDICTION.

The jurisdiction of this court is invoked under 28 U. S. C. § 1254.

STATUTES AND REGULATIONS INVOLVED.

Railway Labor Act, Section 2, First, Second, Third, Fourth, Seventh, and Ninth, 45 U. S. C. § 152, First, Second, Third, Fourth, Seventh, and Ninth, Sec. 5 and Sec. 6. These sections are set out at p. A. 38, *et seq.*

QUESTIONS PRESENTED FOR REVIEW.

1. A union served a notice under Section 6 of the RLA to establish a training program. The carrier, in bad faith, refused to negotiate and refused National Mediation Board (NMB) mediation invoked by the union. Instead it established a training and premotion program by agreement with a second union in direct conflict with its agreement with the first union. It utilized the training program and other means to influence trainees to join the second union, ~~to determine~~ the first union, to deprive it of new members, to flout its contract and, with the purpose ultimately to destroy it.

(a) Does a District Court have jurisdiction to grant injunctive relief under Section 2, First, Second, Third, Fourth or Seventh of the Railway Labor Act ("RLA")?

(b) Was it a violation of due process of law to dismiss the action summarily without giving the union an oppor-

tunity to prove the allegations of the complaint and to show the urgent need for equitable relief?

2. Does a District Court have authority, under Sec. 2, First, Second and Seventh, and Sec. 6, to enforce the carrier duty to bargain and to enforce the *status quo* provisions of RLA pending bargaining?

3. Did the Court of Appeals err in holding that the matter fell within the exclusive domain of NMB as a "jurisdictional dispute" between the two unions notwithstanding that:

(a) RLA § 2, Ninth restricts NMB authority to representation disputes only.

(b) Both the carrier and the second union sought an NMB ruling as to which union was authorized to negotiate on behalf of the apprentices. The NMB ruled that its authority to decide representation disputes under § 2, Ninth and otherwise, did not include power to decide such "jurisdictional" disputes. The courts below failed to consider this holding.

(c) NMB ruled the first union's Section 6 notice was a proper subject for mediation under §§ 5 and 6.

STATEMENT OF THE CASE.

The controversy is presented by two cases and related proceedings before the NMB.

In both cases the district court on motion to dismiss or equivalent motion in an answer dismissed the complaint for want of jurisdiction. The Court of Appeals affirmed both cases in a single opinion.

For the purpose of this petition, the factual background consists of allegations of complaints admitted by motions to dismiss and facts otherwise undisputed.

1. *Background, NMB Phase, and the First Action at Bar.*

The Brotherhood of Locomotive Firemen and Enginemen (BLF&E), a national railroad labor organization, represents all firemen of the Louisville and Nashville Railroad Company (L&N), and the Brotherhood of Locomotive Engineers (BLE), all of its engineers. For many years collective bargaining agreements have been in force between BLF&E and L&N and between BLE and L&N[1] (A. 15).

For years engine service employees have entered service as firemen. The BLF&E-L&N current agreement, which is similar to most such agreements throughout the country, provides that for promotion to engineer, firemen must have prescribed experience and pass examinations (A. 15).

On March 25, 1965, BLF&E served on L&N a notice under Section 6 of the RLA requesting L&N to negotiate with it regarding the establishment of a formal training program for firemen (A. 26). L&N refused to engage in serious negotiations. BLF&E invoked NMB mediation.

NMB docketed the matter as Case A-7829, and assigned a mediator, but the L&N refused mediation.

About one year later, however, L&N and BLE, on April 28, 1966, entered into a purported collective bargaining agreement (A. 16) (For text see Pltf. App., No. 18,479, 20a) with respect to "apprentice locomotive engineers." There was and is no group of L&N employees known as, or certified by NMB as, "apprentice locomotive engineers." From the start of railroading, firemen have been trained to become, and are the source of, engineers. Under the purported agreement, which simply fixed a rate of pay, L&N established a purported apprentice training program for

1. The RLA, Section 2, Eleventh (c), 45 U. S. C. Section 152, Eleventh (c), permits engine service employees to be members of either organization. Most firemen, however, are members of BLF&E and a majority of the engineers are members of BLE. Some engineers, however, are members of BLF&E and some firemen are members of BLE (No. 18,479, A. 7a).

engineers designed to pre-empt the training program proposed by BLF&E. There was and is little need, however, for L&N engineers, there being an adequate number of L&N "promoted firemen" (firemen promoted to engineer but working as firemen due to lack of engineer openings) (A. 17).

On June 6, 1966, the carrier filed a request with NMB alleging that "a jurisdictional issue has arisen" over "a training program for apprentice locomotive engineers (a non-existent class)" and requesting the Board to advise the carriers "as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers." The carrier asserted that the Board had jurisdiction under RLA Section 5, First (the letter is quoted in the NMB reply of June 21) (A. 30).

The Board, after receiving voluminous submissions from the carrier and both unions, held on June 21, "The question as posed involved a question of representation. Such issues are resolved under Section 2, Ninth, of the Railway Labor Act. The application . . . is therefore dismissed." It set August 4 for mediation on the BLF&E Section 6 training program notice (A. 32).

The first case at bar was filed June 27, 1966 as Civil Action No. 5402 (No. 17,588 in the Court of Appeals). Plaintiff was BLF&E, defendant L&N and BLE intervenor defendant. Jurisdiction rested on the RLA and the Interstate Commerce Act, 49 U. S. C. § 1, *et seq.* (A. 6).

The complaint (A. 6) alleged: (1) A BLF&E-L&N long-standing agreement whereby firemen were promoted to engineer and set out the L&N-BLE "apprentice engineer" agreement. (2) L&N was implementing this agreement by making "apprentices" of switchmen, etc., and, BLF&E feared, L&N was about to place them on the engineer seniority roster contrary to the BLF&E-L&N agreement (A. 9). (3) By such acts, L&N intended to repudiate the

existing plan for fireman promotion in the BLF&E-L&N agreement (A. 8). (4) Such acts constituted a violation of the Section 2, First, RLA (carrier duty to make and maintain agreements) and Section 2, Seventh (duty to change agreements only pursuant to Section 6) (A. 10). Plaintiff asked injunctive relief (A. 11).

BLE sought ammunition to counter the BLF&E suit against L&N. NMB in its last communication had stated that the question "as posed" (see A. 32) involved a representation dispute under Section 2, Ninth, rather than a Section 5 dispute. Three days after the BLF&E suit was filed, BLE on July 1, filed a request for NMB services pursuant to Section 2, Ninth (A. 33). The ammunition proved unneeded. Before NMB could act on this latest request, on July 2, the District Court dismissed the BLF&E action for want of jurisdiction (A. 12). The court, in a brief opinion (A. 12) and its conclusions of law (Pltf. App. No. 17588 42a), held that the dispute was a fireman-engineer craft line dispute which lay within the exclusive jurisdiction of the NMB. The court relied upon *Brotherhood of Ry. Clerks* v. *United Air Lines*, 325 F. 2d 576 (C. A. 6th 1963) discussed below. It heard no evidence on the merits or regarding the import of L&N conduct. The court failed to heed the NMB's ruling concerning the limits of its jurisdiction.

On July 22, the NMB dismissed the BLE July 1 application for the reason that "the dispute, if any exists, is not a representation dispute; but may involve an issue as to the right of the employees of one craft or class to do the work that is alleged to be that commonly done by employees in another craft or class. Procedures other than those outlined in Section 2, Ninth, of the Railway Labor Act are available to settle such disputes." (A. 35.) The Board

added that "it has no authority to decide a jurisdictional dispute as such."[1]

NMB stuck to its August 4 date for mediation, but, on that day, BLE filed suit in the District of Columbia against NMB, BLF&E, L&N and other carriers to enjoin negotiation of the BLF&E training proposal until NMB resolved an alleged "jurisdictional dispute." On April 26, 1968, the District Court granted the relief sought. The case is now on appeal before the Court of Appeals for the District of Columbia (No. 22,185 and 22,050).

2. *The second suit—implementation of the apprentice program.*

The second suit was filed on December 22, 1967, about 18 months after the first suit was dismissed. This suit, by eleven L&N firemen and the BLF&E, against L&N and BLE was based on events almost all subsequent to the dismissal of the first action. It charged a violation by L&N of its duty to bargain (A. 26) and a concerted drive by L&N and BLE to interfere with the rights of L&N employees in choice of their union representative and a drive by L&N and BLE to destroy BLF&E (A. 16 *et seq.*).

Jurisdiction was asserted under RLA Section 2, Second, Third, and Fourth. Federal question jurisdiction and jurisdiction under an act regulating commerce also were asserted (A. 14, 26).

The facts establishing violations of Sec. 2, Third and Fourth (set out at p. A-38) are:

After the apprentices had received their training, a stratagem was devised by L&N to hire them as engineers but actually to use them largely as firemen (A. 17-A. 22). First L&N unearthed and misapplied to the apprentices a long

1. The ruling of the NMB was brought to the District Court's attention during its consideration of the BLF&E motion for rehearing and new trial, denied on September 29, 1966.

disused contract provision permitting L&N to hire from other carriers experienced engineers (the "hired engineer" clause). Next, in order to give the apprentices both engineer and firemen seniority dates, certain engineer seniority rosters were needlessly and artificially enlarged for a few days, or even a few hours—just long enough to let each apprentice serve once as an engineer. Such service placed them also on the firemen's roster. The engineer's roster was then cut back, and the new "engineer" put to work as a fireman. By the stratagem, L&N in bad faith disregarded and set aside BLF&E-L&N collective bargaining agreements, regarding employment and promotion of firemen.

Nor was this all.

(1) L&N made clear to the "apprentices" that the BLE is the labor organization it favors by informing them that the apprentice program was an L&N-BLE sponsored program, and by holding graduation ceremonies and dinners inviting BLE, but not BLF&E representaives. The "apprentices" are led to infer that the BLE stands in L&N grace, that they owe a special debt to BLE for their employment and that, accordingly, it is in their interest to join BLE, even though they will spend a substantial portion of their working careers as firemen and not as engineers (A. 23).

(2) L&N has favored the "apprentices" over regular firemen by giving preferential firemen and engineer assignments to the apprentices, by creating special positions as firemen for them to prevent their furlough during slow periods, and by offering them special opportunities to work as engineers. Thus, at the East St. Louis yard a special seniority roster was established on or about November 3, 1967, for "apprentices," which will diminish the employment opportunities for firemen (A. 24). To accelerate apprentice hiring, L&N, despite its claim that there was

a shortage of engineers, has paid heavy bonuses to induce older engineers to retire (A. 22).

L&N has given BLE special opportunities to recruit the apprentices and others as BLE members. Training engineers, where possible, were BLE members and officers (A. 23). They were given an exceptional opportunity which they utilized to encourage the "apprentices" to join BLE. About Fall, 1965, prior to the establishment of the apprentice engineer program on April 28, 1966, L&N appointed a BLE local chairman (chairman of a local lodge) as head of a training program for firemen and engineers. The training program was used to demonstrate L&N's favoritism to BLE and to enable BLE to recruit members. L&N permitted firemen and engineers to attend one or more times with pay, in some cases when they would not otherwise be working. The BLE local chairman was given broad discretion in the selection of students, in the approval of expense reimbursements for attendance etc. He favored BLE members and BLF&E members who he thinks can be persuaded to shift from BLF&E to BLE (A. 24).

(3) L&N granted special favors to BLE and its members. It gave to favored BLE members extra work opportunities not given to engineers generally (A. 25). Favored members of BLE are permitted by L&N to work on behalf of BLE on L&N time and in some cases are credited for mileage not actually operated by them (A. 25). Had the L&N hired the firemen it needed in the manner it had previously done, they would have been represented by BLF&E (Par. 8, No. 18,479, A. 7a). L&N thereby sought to secure firemen whose loyalties would be with the BLE, rather than the BLF&E, and who could be counted on to vote for the BLE in any future representation election (A. 16).

(4) The L&N tactics have been effective. Approximately 64 "apprentices" purportedly have been promoted

to engineer. Only six have joined BLF&E. The bulk of the remainder have joined the BLE (A. 23). Yet the 64 are working almost entirely as firemen. Firemen who were BLF&E members have dropped such membership and joined BLE.

The facts establishing violation by L&N of its duty to bargain under Sec. 2, Second are as follows:

On March 25, 1965, BLF&E served a Section 6 notice on L&N requesting negotiation of a training program for firemen. After the L&N refused to negotiate and after services of the NMB were invoked, L&N made an agreement on April 28, 1966 with the BLE covering the same subject matter, and implemented that agreement in the manner set forth above (A. 16, A. 26).

By the acts described above and other similar conduct, the individual plaintiffs have and will continue to sustain great and irreparable injury to their right to be represented for collective bargaining purposes by the BLF&E, to their right of effective representation by BLF&E without L&N and BLE interference, influence or coercion, and to their right to work without discrimination in accordance with the collective bargaining agreement between the BLF&E and L&N. Similarly such conduct has and will continue irreparably to injure in a substantial manner the right and duty of the BLF&E to represent for collective bargaining purposes the firemen employed by the L&N.

The complaint requested injunctive relief.

The complaint in No. 18,479, like the prior complaint, was dismissed on motion for want of jurisdiction (Pltf. App. No. 18,479, A. 59a). The District Court (Plft. App. No. 18,479, 56a-58a) took the view that the complaint "essentially" alleged a dispute within the domain of NMB. The complaint was also predicated "in important part" on allegations of BLF&E-L&N contract violation. This aspect

of the controversy fell exclusively within the jurisdiction of the National Railroad Adjustment Board. In any event the suit was a relitigation of No. 17,588. The Court of Appeals affirmed. It held that the dispute was a jurisdictional dispute within the exclusive jurisdiction of the NMB. The court did not pass on the lower court Adjustment Board holding.

REASONS FOR GRANTING THE WRIT.

1. *The decision below:*

A. *Wrongly holds there is no federal jurisdiction to halt current sophisticated carrier devices to coerce employees and interfere with their choice of representation.*

B. *Deprives petitioner union of a hearing on serious charges of employer coercion in violation of due process.*

C. *Effectively negates long established holdings of this Court.*

The complaint in Case No. 18479 details for some 18 pages both the blatant and the subtle devices used by L&N to influence its employees to join a union other than BLF&E, and to destroy BLF&E (See summary pp. 7-10 above). This comprehensive catalog the court below encompasses into a single pallid, brief paragraph.[1] Even this inadequate summary demonstrates an unquestioned basis for relief. The court next disregarded long established authorities holding that a federal court has jurisdiction to grant injunctive relief on the facts alleged.

1. "The Firemen's Union contends that L&N and the Engineers' union are working together to influence prospective firemen to join the Engineers' union with the goal of eventually ousting the Firemen's union as bargaining representative of L&N firemen. It is said that apprentice engineers are being influenced to join the Engineers' union and are moving into firemen's jobs when not working as engineers. The Firemen's union seeks to enjoin the appellees from interfering with the free choice of bargaining representatives and, more importantly, to end the apprentice engineers program." 400 F. 2d 572, 575.

The leading case is *Texas & N. O. Ry. Co.* v. *Brotherhood of Railway and Steamship Clerks*, 281 U. S. 548, 74 L. Ed. 1034 (1930). There, this Court upheld an order requiring a carrier to disestablish a company union and reinstate an independent union as the bargaining representative. At that time, Section 2, Third, prohibited "* * * interference, influence, or coercion exercised by either party over the self-organization or designation of representatives by the other * * *," conduct clearly similar to that involved here.[1] Section 2, Fourth was added to the Act four years after the *Texas & N. O. Ry.* case. One of its purposes was to prevent employers from coercing employees into joining a union favored by the carrier, the very action enjoined in that case.

Texas & N. O. Ry. was reaffirmed in *Virginian Ry. Co.* v. *System Federation No. 40*, 300 U. S. 815, 81 L. Ed. 789 (1937). There, this Court held that a federal court has jurisdiction to issue a mandatory injunction to compel a railroad to bargain with the designated representative of its employees.[2]

Both cases were cited to the court below and the distinction between the two cases at bar set out fully. Yet the Court of Appeals stated cryptically: "The second case is another attempt to have this jurisdictional dispute between two unions litigated in federal court."

We discuss below the "jurisdictional dispute" aspect of the case. But even if it be assumed *arguendo* that there was a jurisdictional dispute within the exclusive jurisdic-

1. The wording of the statute has been slightly changed and now reads "* * * interference, influence or coercion by either party over the designation of representatives by the other; * * *".

2. Other courts have ruled similarly: *Brotherhood of Railroad Trainmen* v. *Central of Ga. Ry. Co.*, 305 F. 2d 605 (C. A. 5th (1962)), holds that under Section 2, Third, a District Court has jurisdiction to enjoin a carrier from interfering with a union by bringing false charges against a union official.

tion of the NMB, NMB has no authority to protect employees from unlawful influence of their employer or to protect the petitioner union from the employer's destructive war against it. Only a federal court can grant such relief. The triad of cases cited by the court below: *Switchmen's Union* v. *Board,* 320 U. S. 297, *General Committee* v. *M. K. T. R. Co.,* 320 U. S. 323, *General Committee* v. *Southern Pac. Co.,* 320 U. S. 338, make this clear. In those cases this Court re-emphasized the right of a union to secure judicial relief for carrier violation of the Railway Labor Act. *The T. & N. O. and Virginian cases were specifically and categorically re-affirmed (See, e.g., 320 U. S. at 329 et seq., and 320 U. S. at 317).*

The result of the Sixth Circuit holding is a gross denial of due process of law. If the order of dismissal is permitted to stand petitioners will never have had a hearing on the merits. They will have been denied an opportunity to demonstrate the drastic consequences to the union and the firemen of carrier coercion and intimidation. This Court should act to protect the clear constitutional right of the petitioners to a hearing of serious charges.

"Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense,—whether it has had an opportunity to present its case and be heard in its support." *Brinkerhoff-Faris* v. *Hill,* 281 U. S. 673, 681 (1930) (Mr. Justice Brandeis).

We ask this Court to grant review here not only to assure due process but to reinterpret and re-apply the teachings of *T & N. O.* and *Virginian* in light of present-day carrier evasive devices.

Petitioners fear that the holding below will light a path for carrier evisceration of RLA. It teaches that what cannot be done overtly can be accomplished by carrier adroitness.

2. *The decision below, contrary to a holding of this Court, and in conflict with a Fifth Circuit decision, refuses to enforce the RLA mandate to bargain and to maintain the status quo during bargaining.*

The facts before the Court establish a clear-cut violation by L&N of its duty to bargain and to maintain the *status quo*. BLF&E served a Section 6 notice upon the L&N to negotiate a training program for firemen. The L&N refused to negotiate and joined other carriers in an attempt to secure an NMB ruling that the notice was not bargainable. The NMB ruled that the notice was bargainable and docketed the request of the BLF&E for mediation. While the matter was in mediation, and more than a year after the BLF&E Section 6 notice was served, the L&N made an agreement on a similar subject matter with another union. It implemented that agreement by actions, related above, injurious to firemen represented by BLF&E and to BLF&E. Additionally it changed detrimentally the conditions of employment of firemen as they existed at the service of the BLF&E Section 6 notice.

The court below did not consider these serious charges. Its one paragraph summary of the complaint (see p. 11) makes no mention of these facts.

The court fails to refer to the arguments advanced to it by petitioners based on the RLA, opinions of this Court and opinions of other courts.

The applicable RLA provisions are Section 2, First and Second, and Section 6. In particular, Section 6 provides:

> ". . . In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, *rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon*

> *as required by Section 5 of this Act, by the Mediation Board*, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board." (Emphasis supplied.)

The case at bar is analogous to a Fifth Circuit decision, *United Industrial Workers v. Board of Trustees of Galveston Wharves*, 351 F. 2d 188 (1965). There, a collective bargaining agreement between Galveston Wharves and a union related to a grain elevator. The agreement, although it contained an expiration date, nevertheless continued indefinitely until changed pursuant to Section 6 of the Railway Labor Act (351 F. 2d at 185).

When the union served notice to open the contract for negotiation the carrier said that it had leased the elevator to an independent company and that all employees would be laid off. On the effective date of the lease, the union went on strike and simultaneously instituted an action to compel the carrier to operate the elevator until the RLA machinery for contract modification had been exhausted. The Fifth Circuit held that during the existence of a contract relationship between employer and employee and while contract modification negotiations were in progress an employer could not render the negotiations a nullity by leasing the elevator. It was required to exhaust the processes of the Railway Labor Act before doing so.

The court cited the *Fibreboard* decision of this Court in support of its position. In *Fibreboard Paper Products Corp. v. N. L. R. B.*, 379 U. S. 203, the employer and a union had a collective bargaining agreement in force expiring on July 31, 1959. The union gave timely notice of its desire to modify the contract. The company however, refused to negotiate and instead sub-contracted the work to another company. This Court held that there was a duty to bargain with the union regarding subcontracting as a

matter relating to "wages, hours, and other terms and conditions of employment" under the Labor Management Relations Act. That language it will be noted, is the LMRA analogue of the RLA "rates of pay, rules and working conditions."

Fibreboard in turn relied on a case under the Railway Labor Act, *Order of Railway Telegraphers* v. *Chicago & North Western*, 362 U. S. 330, where this Court held that a carrier had a duty under the Railway Labor Act to bargain about a system-wide abolition of certain positions then proposed by the carrier.

Galveston Wharves is the essential next step if the *Fibreboard-Telegraphers* doctrine is to have meaning where an employer does more than refuse to bargain and actively works toward union destruction. The case at bar, moreover, we submit, is indistinguishable from *Galveston Wharves*.

In the case at bar there is a contractual relationship between the firemen and the carrier regarding the employment of firemen. In accordance with decades of custom in the industry, firemen learn to be engineers while working as firemen, and are promoted to engineer in due course.

The BLF&E served notice pursuant to Section 6 of the Railway Labor Act seeking to formalize and systematize the training program. The carrier refused to negotiate, entered into a similar arrangement with another organization and seeks to destroy the fireman craft by way of all the devices set out above. In *Galveston Wharves* the employer action in one stroke, sought to destroy the jobs of the employees and with it the raison d'etre of the contract. Here, the L&N action, in time, will have the same destructive consequences. By employing "apprentices," under the benevolent auspices of the BLE agreement, the L&N-BLF&E contract remains in effect but is slowly sapped of

its vitality by the "apprentices." The craft of firemen, represented by BLF&E, faces extinction, and deprived of the life blood of new members, BLF&E is drained, more slowly to be sure, but as surely as the union in *Galveston Wharves*. This result follows because of L&N disregard of the BLF&E training proposal request and because of L&N flouting the RLA requirements for contract negotiation and maintenance of the *status quo*.

In both cases the *status quo* was seriously disturbed. "The legislative history [of the Railway Labor Act] indicated that when the rail unions and carriers agreed upon these provisions, the unions surrendered their right to strike pending exhaustion of major dispute procedures in exchange for a statutory provision restraining management from disturbing the *status quo*." *Rutland Ry.* v. *Brotherhood of Locomotive Engineers*, 2 Cir. 1962, 307 F. 2d 21, 43 (Marshall, J., dissenting). The foregoing was cited with approval in the most recent opinion of the Fifth Circuit in *Galveston Wharves*, 400 F. 2d 320, 323 (1968).

There the Court held that under RLA, a court had authority to order the discharged employees reinstated pending bargaining and to order back pay. A gulf separates *Galveston Wharves* and the case at bar: the Fifth Circuit first enforced carrier duties imposed by RLA and then fashioned a meaningful remedy. The Sixth Circuit

permits dismissal on motion, without a hearing, of a complaint alleging gross violations of substantially similar duties.

Surely, here, BLF&E is entitled to judicial relief from the extraordinary statutory violations at bar.

3. *The decision below thrusts on NMB the duty to resolve jurisdictional disputes even though no such power is conferred by statute and such task would gravely hamper NMB in performing its proper statutory duties. The decision is in the face of a specific NMB holding that it lacks power to consider such disputes generally and this claimed dispute specifically. It misapplies three 1943 decisions of this Court.*

The Court below fobs off the controversy to the NMB saying that it is but a jurisdictional dispute between labor unions and that the NMB has exclusive jurisdiction. This holding is utterly wrong and should be corrected here. The Act places on NMB two principal functions: assisting the parties in the resolution of their disputes by mediation (§ 5) and supervising the designation of collective bargaining representatives (§ 2, Ninth).

The latter NMB function relates to "representation disputes"—disputes between two rival unions as to which shall be the collective bargaining representative.

The NMB is authorized to conduct an election, or to use "any other appropriate method" to ascertain the em-

ployees' representative and then to certify such representative to the parties. If there is a bona fide representation dispute, then, as a necessary step to its resolution, the Mediation Board may determine the bargaining unit ("craft or class" to use RLA language) for purpose of an election. *Brotherhood of Ry. Trainmen* v. *NMB*, 135 F. 2d 780, 782-4 (C. A. D. C. 1943).

Once it performs these functions its statutory duties, and powers, cease.

Its authority does not extend to jurisdictional disputes *per se*, assuming for the moment, the dispute is "jurisdictional".[1] There are the most compelling reasons for confining Section 2, Ninth to its precise language.

Under Section 5, NMB is a mediator; under Section 2, Ninth, a judge. Its duty under Section 5 demands understanding and rapport with the parties; under Section 2, Ninth, it must make decisions bound to touch raw nerves. Section 2, Ninth provides that NMB may even insulate itself by appointing three neutrals to conduct the election.

It is significant that in industry generally subject to federal labor law these two functions are separated. The United States Mediation and Conciliation Service is an agency separate from the National Labor Relations Board which determines the bargaining unit.

Yet the decision below would force NMB into the maelstrom of jurisdictional contention, contrary to the statute. This Court, indeed no reviewing court other than the court below, has ever held NMB has authority in this area. Nor is this all. The decision would force NMB to make craft or class determinations in a vacuum, prematurely, *before* the parties have bargained out an apprentice program and *before* apprentice duties have been set.

---

1. It is not jurisdictional in the usual sense of a dispute as to which of rival crafts shall perform certain work.

The decision below, further, is contrary to the NMB view of its authority. All parties here sought NMB assistance. NMB held it had authority to mediate the BLF&E-L&N controversy regarding the BLF&E Section 6 notice for a training program. But it held it had no authority, as requested by L&N or BLE, to decide craft or class lines, or to decide a jurisdictional dispute or such.[1] Yet this is precisely the role forced upon it by the decision below. The parties are sent to NMB, even though NMB has held it has no authority to rule on their controversy.[2]

The court below misinterpreted the 1943 triad of cases:[3] *Switchmen's Union* v. *Board*, 320 U. S. 297; *General Committee* v. *M. K. T. R. Co.*, 320 U. S. 323; *General Committee* v. *Sou. Pac. Co.*, 320 U. S. 338.

In *Switchmen's Union* this Court held simply that federal courts have no jurisdiction to review an NMB decision regarding the appropriate bargaining unit for purposes of

1. The NMB position seems clearly sound. See *Brotherhood of Trainmen* v. *NMB*, 135 F. 2d 780 (C. A. D. C. 1943), decided by Chief Judge Groner, and Judges Fred Vinson and Wiley Rutledge, which seems squarely in point. This case was cited with approval in *Switchmen's Union*, 320 U. S. 297, 301 and *MKT*, 320 U. S. 323, 336, n. 11. These cases are discussed at pp. 20-21.

2. As we noted above, the District Court for the District of Columbia, however, has directed NMB under Sec. 2, Ninth to investigate "the dispute between plaintiff [BLE] and defendant BLF&E . . . and to certify . . . whether apprentices being trained to become locomotive engineers come within the craft or class of locomotive engineers . . . or firemen . . . if either." (A. 341-2, in Court of Appeals for District of Columbia, No. 22,050.) NMB and BLF&E have appealed this decision to the Court of Appeals for the District of Columbia where it is now pending.

3. Another case cited by the Court of Appeals, is its 1963 decision in *Brotherhood of Railway & S. S. Clerks* v. *United Air Lines, Inc.*, 325 F. 2d 576, *cert. gr.* 377 U. S. 903; *cert. dismissed* as improvidently granted, 379 U. S. 26 (1964). There the Clerks represented employees of Capital Airlines which merged with United Air Lines. The Court held there was no federal jurisdiction to decide representation questions pending NMB action, or the effect of a contract provision binding the successor of Capital Airlines. The case at bar involves no such issues.

a representation election. No such question is here involved. In *MKT* the BLF&E and a carrier, with NMB as mediator, had entered into an agreement relating to emergency engineers. BLE claimed that the agreement infringed upon its rights. *Southern Pacific* raised the same issue as *MKT* and in addition raised the question of the validity of a BLF&E-carrier contract provision permitting BLF&E to handle grievance claims of BLF&E members for work done as an engineer and subject to the BLE contract. Such matters the court held were representational or jurisdictional questions removed from judicial scrutiny.

CONCLUSION.

The case at bar is not confined to issues capable of NMB resolution. The complaint here is that the railroad had refused to bargain, has seriously disturbed the *status quo*, and has used the apprentice question as a handy tool for employee coercion and union destruction. Even if it be assumed *arguendo* that NMB does have authority to decide the apprentice question, it clearly has no authority to require bargaining, to restore the *status quo* and to ban L&N from its destructive warfare against BLF&E. The L&N campaign is not confined to the apprentice matter. Rather the apprentice issue is being used by L&N as an excuse not to bargain and as a wedge to drive BLF&E off the property. Only a federal district court, armed with its plenary powers can halt the carrier depredations. As pointed out above (p. 13), this Court in the *Switchmen's Union* trilogy, emphasized the obligation of the federal courts to grant relief for carrier violations of the Act (See, *e.g.*, 320 U. S. at 329 *et seq.* and 320 U. S. at 317).

This is the aspect of the matter the Sixth Circuit failed to grasp. The decision below, if left to stand, will perpetuate endless mischief and open to carriers vast areas

of employee intimidation and union destruction if they but find a so-called "jurisdictional dispute" to act as their insulator.

We ask that the Court grant certiorari, reverse the decision below, and order a trial on the complaint.

Respectfully submitted,

HAROLD C. HEISS,
ALEX ELSON,
WILLARD J. LASSERS,
AARON S. WOLFF,
ROBERT E. HOGAN,
HERBERT L. SEGAL.

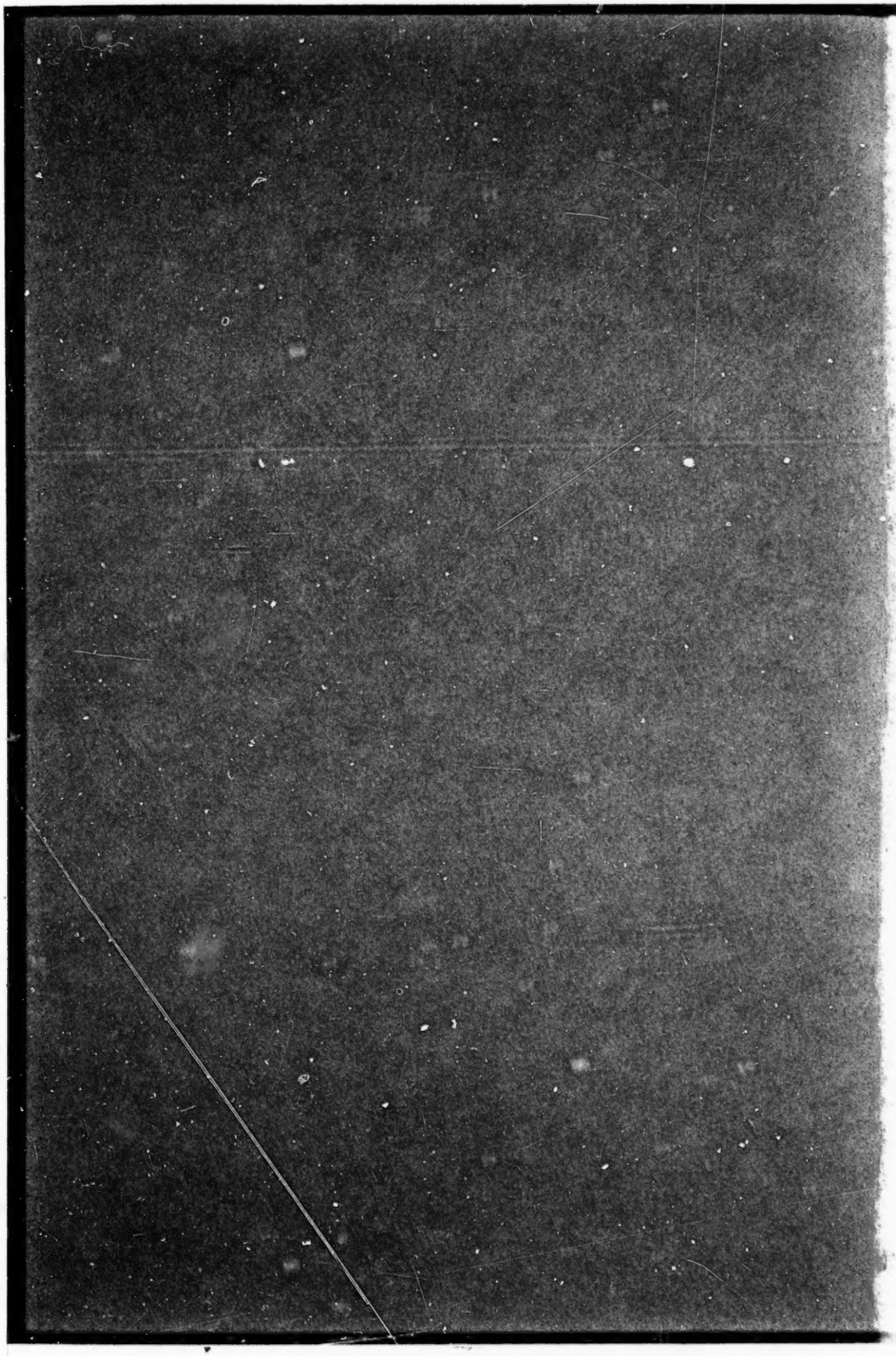
HAROLD C. HEISS,
RUSSELL B. DAY,
HEISS, DAY AND BENNETT,
622 Keith Building,
Cleveland, Ohio, 44115,

ALEX ELSON,
WILLARD J. LASSERS,
AARON S. WOLFF,
ELSON, LASSERS AND WOLFF,
11 South La Salle Street,
Chicago, Illinois 60603,

ROBERT E. HOGAN,
Kentucky Home Life Building,
Louisville, Kentucky,

HERBERT L. SEGAL,
SEGAL, ISENBERG, SALES AND STEWART,
Republic Building,
Louisville, Kentucky 40202.

November 26, 1968.



APPENDIX.

OPINION OF UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT (400 F. 2d 572).

Decided August 28, 1968—Before McCree and Combs, *Circuit Judges,* and McAllister, *Senior Circuit Judge.*

Combs, Circuit Judge. These appeals are taken from the District Court's action dismissing the complaint of plaintiff-appellant, Brotherhood of Locomotive Firemen and Enginemen (hereinafter referred to as Firemen's union) in two different suits stemming from alleged violation of the Railway Labor Act. The first suit was brought against the Louisville and Nashville Railroad Company (hereinafter referred to as L&N), with the Brotherhood of Locomotive Engineers (hereinafter referred to as Engineers' union) intervening as defendant. The second suit was brought by the Firemen's union and certain individual members against the L&N and the Engineers' union. Since both suits arose out of the same factual background, they were consolidated on this appeal. The general background is as follows.

The firemen's union represents the overwhelming majority of firemen on the nation's railroads. Due to advances in railroad technology over the last half century, most trains do not, and have not for some time, required the services of firemen as such. With the advent of diesel and electric locomotives, the need for someone to "fire the boilers" has been eliminated. The continued use of firemen (now called helpers) on locomotives has been justified for several reasons. For example, they serve as a lookout, perform some mechanical tasks, relieve the engineer, and are a source of future engineers.

Involved in these cases is the status of firemen as future engineer. Formerly, virtually all engineers started out as firemen. The Firemen's union contracts with all railroads, including the L&N, have long contained a provision whereby firemen could be promoted to engineer. The Firemen's union construes this provision to mean that, after three years' road experience and the successful completion of mechanical tests given by the company, a fireman is eligible for promotion to engineer. Also, that engineers may be acquired from other sources only when no firemen are available. The L&N does not take such a restrictive view of this provision, arguing that it merely provides a procedure whereby firemen may become engineers rather than serving as a limitation on the procurement of engineers.

In April, 1966, L&N established in conjunction with the Engineers' union a training program for "apprentice engineers." An agreement between L&N and the Engineers' union set the compensation for these trainees. The program has no connection with the contract procedure for advancing firemen to engineers and, according to L&N, was initiated only to supplement the number of engineers obtainable from the ranks of firemen. The Firemen's union claims that the program violates the bargaining agreement.

In case No. 17,388, the Firemen's union seeks to invoke Section 2, Seventh of the Railway Labor Act, which reads:

> "No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in Section 6 of this Act."

Section 6 of the Act provides, among other things, for the orderly adjustment of disputes and bargaining differences under the auspices of the National Mediation Board. The Firemen's union contends that, in establishing the apprentice engineers program, L&N changed a rule embodied in

the collective bargaining agreement without following the procedures of Section 6. In this action, the Firemen's union seeks to enjoin L&N from carrying on the apprentice training program and to vacate any promotions made through the program. The Engineers' union was permitted to intervene as a defendant. The District Court dismissed the complaint on the ground that it lacked jurisdiction to entertain the suit. We affirm.

The Railway Labor Act is a comprehensive statutory plan for resolving disputes between transportation companies and their employees. The Act looks toward the orderly resolution of disputes and sets up procedures whereby this goal may be accomplished. One of the things condemned by the Act is unilateral action by a party to an agreement which has the effect of changing the status quo established by the agreement. A United States District Court has jurisdiction to enjoin such action. *Texas & N. O. R. Co. v. Ry. Clerks*, 281 U. S. 548 (1930).

However, there are certain types of disputes encompassed by the Act which may not be resolved by the courts. One of these is a representation or jurisdictional dispute between labor unions. *Switchmen's Union* v. *Board*, 320 U. S. 297 (1943); *General Committee* v. *M.-K.-T. R. Co.*, 320 U. S. 323 (1943); *General Committee* v. *Sou. Pac. Co.*, 320 U. S. 338 (1943). Congress has conferred exclusive jurisdiction upon the National Mediation Board to resolve such disputes.[1] Section 2, Ninth of the Railway Labor Act, 45 U. S. C. § 152.

In the *M.-K.-T. R. Co.* case, *supra*, a jurisdictional dispute within the meaning of the Act was defined as "an

1. It is noted that the United States District Court for the District of Columbia has recently ordered the National Mediation Board to hear this dispute, the Board having originally declined to assume jurisdiction. *Brotherhood of Locomotive Engineers* v. *National Mediation Board*, Civil No. 2080-66, D. D. C., April 26, 1968.

asserted overlapping of interest of two crafts" necessitating a determination of the point where the authority of one craft ends and the other begins. The Supreme Court said, "Congress did not attempt to make any codification of rules governing these jurisdictional disputes." 320 U. S. 323, 335.

A similar problem was presented to this Court in *Brotherhood of Railway & S. S. Clerks* v. *United Air Lines, Inc.*, 325 F.2d 576 (6th Cir. 1963), cert. denied, 377 U. S. 903 (1964), cert. dismissed as improvidently granted, 379 U. S. 26 (1964). In that case, Capital Airlines merged with United Air Lines. The appellant union had a collective bargaining agreement with Capital. The former Capital employees were grouped, most of whom were non-union, the remainder being represented by the International Association of Machinists. The Brotherhood filed suit, seeking a declaration that the contract survived the merger and that it still represented the former Capital employees.

This Court pierced the technical issues of pleading in *United Air Lines*, and held that the case involved a representation dispute which fell within the exclusive jurisdiction of the National Mediation Board.

The Firemen's union contends it was error to permit the Engineers' intervention. Under our view of the case, it is apparent that the Engineers' union was properly permitted to intervene under Rule 24(A) (2), Federal Rules of Civil Procedure. Other arguments and contentions of appellant are similarly without merit.

The complaint in the second case, No. 18,479, alleged that L&N and the Engineers' union had violated Section 2 Third and Fourth of the Railway Labor Act. Briefly stated, these sections guarantee carrier employees the right to organize and bargain collectively through a representative

of their own choice. They also prohibit the carrier or anyone else from influencing, coercing, or otherwise interfering with the free choice of a bargaining representative.

The Firemen's union contends that L&N and the Engineers' union are working together to influence prospective firemen to join the Engineers' union with the goal of eventually ousting the Firemen's union as bargaining representative of L&N firemen. It is said that apprentice engineers are being influenced to join the Engineers' union and are moving into firemen's jobs when not working as engineers. The Firemen's union seeks to enjoin the appellees from interfering with the free choice of bargaining representatives and, more importantly, to end the apprentice engineers program.

The District Court dismissed the complaint, concluding that "this case concerns the same subject matter and same relief heretofore denied by this Court in Civil Action No. 5402 [No. 17,588] . . . ."

It is clear that the second case is another attempt to have this jurisdictional dispute between two unions litigated in federal court. The rule is plain: Jurisdictional disputes between labor organizations governed by the Railway Labor Act are within the exclusive jurisdiction of the National Mediation Board.

The judgment of the District Court dismissing the complaint in each case is affirmed.

COMPLAINT IN NO. 17,588.

(Plaintiff's Appendix in Court of Appeals Pages 5a-11a.)

COMPLAINT.

The Brotherhood of Locomotive Firemen and Enginemen, Plaintiff above named, for its cause of action against the Louisville and Nashville Railroad Company, Defendant above named, states as follows:

(1) This action is one for a restraining order and an injunction to restrain and enjoin the Defendant railroad from engaging in wrongful and unlawful acts, and from violating the terms and provisions of the Railway Labor Act.

(2) Jurisdiction of this Court is invoked and attaches pursuant to the Acts of Congress and statutes of the United States, to-wit: The Railway Labor Act (45 USC, Sections 151, et seq.); Interstate Commerce Act (49 USC, Sections 1, et seq.); and the Act of June 25, 1948 (28 USC, Sec. 1337).

(3) Defendant, Louisville and Nashville Railroad Company, is a Kentucky corporation, having its principal office in Kentucky located in Louisville, Kentucky. Said defendant is a common carrier engaged in interstate and intrastate commerce by railroad, and is subject to the laws of the United States in respect thereto, as hereinafter set out. As such common carrier, defendant owns and operates a railroad in thirteen states of the United States.

(4) Plaintiff is a national railway labor organization, having its principal office and headquarters at Cleveland, Ohio. Plaintiff has been for many years, and now is, the duly designated and authorized bargaining representative of and for the firemen's crafts, for the purpose of the Railway Labor Act, employed on the defendant railroad.

(5) Plaintiff, acting through its duly authorized representatives, representing the locomotive firemen's crafts employed on the defendant railroad, has, during many years prior to the filing of this complaint, negotiated and entered into collective bargaining agreements with the defendant railroad, for the purpose of establishing the rates of pay, rules and working conditions pertaining to the firemen's crafts employed on the Louisville and Nashville Railroad System, pursuant to the requirements of the Railway Labor Act.

(6) The Defendant, Louisville and Nashville Railroad Company, is managed and operated by officers who function as the management of the entire Louisville and Nashville Railroad System. Said defendant is engaged in interstate commerce, as a "carrier", as defined in Section 1 of the Railway Labor Act (45 USC, Sec. 151), and is subject to the provisions of said Act.

(7) Plaintiff heretofore, acting by and through its duly authorized agents and representatives, and the Defendant, the Louisville and Nashville Railroad Company, acting by and through its duly authorized agents and representatives, executed and entered into an agreement in writing which established a plan for the training and development of an adequate corps of qualified and competent locomotive engineers. Said plan contemplates and provides that firemen shall train to become engineers by working for a period of three (3) years as firemen, and shall, during that period, pursue a course of study pertaining to the operation of locomotives and to the construction and operation of the braking systems with which locomotives and trains are equipped. The said plan also makes provisions for the carrier to employ, when the carrier has an insufficient corps of engineers to fulfill its need for engineers, "hired engineers" in a certain ratio to the number of firemen that are being trained to be promoted to engineers.

"Hired engineers" are persons who have been trained and have become qualified to assume the responsibilities of engineer, by having been trained and employed on other railroads.

(8) The plans for the training, development and acquisition of sufficient qualified engineers to meet the carrier's need constitutes Article 26, Sections 2 through 12, inclusive, and Section 20, of the existing collective Agreement in effect between plaintiff and the defendant, the Louisville and Nashville Railroad Company. A copy of the aforesaid is attached as part hereof.

Paragraph (9) Stricken by Amendment to Complaint.

(10) The existing plan for the training and acquisition of an adequate corps of qualified engineers provides that when the Louisville and Nashville Railroad Company finds it necessary to acquire additional engineers by employing "hired engineers", the engineers thus acquired shall be given a seniority date as firemen commensurate with their seniority date as engineers, and they thereby become members of the firemen's craft and work as firemen when their services, as engineers, are not needed by the Louisville and Nashville Railroad Company.

(11) On or about April, 1966, the defendant herein, without prior notice to the plaintiff, instituted a program for the training of so-called "apprentice engineers", by selecting employes from other crafts on the defendant railroad, such as employes of the brakemen's craft and employes from the switchmen's craft, and by employing persons from the public, who are not qualified as "hired engineers", and placing them in such aforesaid training program; and the Louisville and Nashville Railroad Company has thereby declared and made known to the plaintiff its intention to disregard, deliberately violate and repudiate its existing plan for the training and acquisition

of engineers, covered by the agreement now in effect between plaintiff and the defendant, as hereinbefore set forth.

(12) Plaintiff is informd and believes, and upon such alleges, that the defendant railroad is about to, and will, unless enjoined and restrained from so doing, place a number of its so-called "hired engineers" on the engineers' seniority roster, give them seniority dates as engineers and also seniority dates as firemen, contrary to the existing agreement between plaintiff and defendant.

(13) Plaintiff further alleges that by, through and because of historical custom and practice, engineers have been obtained by the promotion of firemen and by "hiring" qualified engineers. Further, said plan and the custom and practices thereunder constitute rules of employment and working conditions, within the meaning of the Railway Labor Act.

(14) Plaintiff states that Section 2, First; Section 2, Seventh; and Section 6, of the Railway Labor Act, read, respectively, as follows:

> "Section 2, First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions . . ."
>
> "Section 2, Seventh. No carrier, its officers, or agents shall change the rates of pay, rules or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 6 of this Act."
>
> "Section 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conferences between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be

within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules or working conditions shall not be altered by the carrier until the controvery has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board."

(15) Plaintiff states that the actions of the Louisville and Nashville Railroad Company, defendant herein, in violating and repudiating the existing plan for the training and acquisition of qualified engineers, and the institution by defendant of a new so-called "Engineer Apprentice Training Program" violates Section 2, Seventh, of the Railway Labor Act which prohibits carriers from changing rules of employment and working conditions as contained in existing collective agreements, without first following the procedure required by Section 6 and by Section 3 of the Railway Labor Act, by negotiating with the plaintiff for desired changes in the existing collective agreement.

(16) The plaintiff Brotherhood has no adequate remedy at law to prevent the Louisville and Nashville Railroad from carrying out its intended and threatened acts, as herein set forth, which are contrary to the prohibitions of the Railway Labor Act, and that, unless restrained and enjoined from so doing said defendant will carry out its intended and threatened acts, as hereinbefore set out. Further, that great and irreparable injury and damage will be suffered and sustained by the plaintiff Brotherhood and the employees it represents unless said defendant is restrained and enjoined from carrying out its intended and threatened acts, as hereinbefore set out.

Further, that great and irreparable damage will be suffered and sustained by plaintiff Brotherhood and the employees it represents caused by delay in giving notice of an application to this Court for a restraining order or injunction.

WHEREFORE: Plaintiff, Brotherhood of Locomotive Firemen and Enginemen, demands:

(1) That this Court issue a temporary restraining order forthwith, and without notice, and a preliminary injunction, to be made permanent on final hearing, enjoining, restraining and ordering the Defendant, Louisville and Nashville Railroad Company, and all persons acting in concert or participating with it, jointly or severally, to:

(a) Cease and desist assigning or placing men in the so-called engineers' training program; and from: (i) allowing said men to acquire firemen's seniority dates and entering the firemen's craft and performing service customarily and historically performed by firemen in the process of qualifying for promotion to engineers.

(b) Vacate, void and hold for naught any promotions heretofore made to engineers, except as taken from the ranks of the craft of fireman.

(c) Take all action, forthwith, as may be necessary to insure that Article 26, Sections 2 through 12, inclusive, of the existing agreement, and all other agreements between the Plaintiff and the Defendant, and the applicable provisions of the Railway Labor Act, are carried out and complied with.

(2) That Plaintiff be granted such other and further relief, including the cost of this action and attorney's fees, as this Court may or shall deem necessary or proper.

DISTRICT COURT'S DECISION IN NO. 17,588.

Plaintiff's Appendix in Court of Appeals,

Pages 39a-40a.

COURT'S DECISION.

July 2, 1966

Louisville, Kentucky

Before Honorable James F. Gordon, United States District Judge, Western Division of Kentucky, on Saturday, June 2, 1966, at Louisville, Kentucky.

BY THE COURT: Gentlemen, as to the motion of the Defendant Louisville & Nashville Railroad and the Brotherhood of Locomotive engineers, the Court will sustain the motions and dismiss this action for lack of jurisdiction and dissolve the restraining order now in effect.

It appears to this Court that the resolution of the problems presented here fall within the purview of the Railway Labor Act, as the same, in essence, to me represent a dispute between the Firemen and the Engineers as to their craft lines relative to the training of apprentice engineers and the source from which these individuals must come.

Congress took away from the courts of the United States, who, admittedly, do not understand the operational problems or jargon of the Railway Industry, the right to determine such jurisdictional disputes.

The relief sought by the Firemen, if available to them, in the judgment of this Court, must be obtained by them by procedure under the Railway Labor Act.

The Court follows the language of the Sixth Circuit in the Brotherhood of Railway Clerks against the United Airlines and the Defendant will submit proposed findings of fact and conclusions for this ruling.

COMPLAINT IN NO. 18,479.

Plaintiff's Appendix in Court of Appeals,

Pages 4a-19a.

COMPLAINT.

(Filed December 22, 1967.)

Now Comes plaintiffs, B. A. Turner, G. J. Calhoun, E. A. Heckel, T. T. Holsinger, D. L. Cooksey, R. M. Muirheid, W. A. Pierce, J. G. Starrett, R. A. Green, Emmett Clark, John Hundley, and Brotherhood of Locomotive Firemen and Enginemen (BLF&E), by Harold C. Heiss, Robert E. Hogan, Herbert L. Segal, Alex Elson, and Elson, Lassers and Wolff, attorneys for plaintiffs and complain against defendants Louisville and Nashville Railroad Company (L&N) and Brotherhood of Locomotive Engineers (BLE) and allege:

1. BLF&E is a labor organization, national in scope, which represents all of the firemen employed by L&N. There is now in force between L&N and BLF&E a labor contract relating to the employment of firemen on the L&N. The individual plaintiffs are firemen or "promoted firemen," as hereafter defined, employed by L&N. The individual plaintiffs have a right under federal statutes, hereafter alleged, to be represented for collective bargaining purposes by the labor organization of their choice, namely BLF&E. They have a right, additionally, to effective representation by the labor organization of their choice, unhampered by unlawful acts of a carrier or another labor organization. Both such rights have been and are being impaired by L&N and BLE, as more fully alleged below.

2. L&N is a common carrier by railroad and is an "em-

ployer", as defined in Section 1 of the Railway Labor Act, 45 U. S. C. § 151. BLE is a labor organization, national in scope, and for many years has represented the engineers employed by L&N. There is now in force a labor contract between L&N and BLE relating to the employment of engineers on the L&N.

3. Jurisdiction is conferred on the Court by the Railway Labor Act, 45 U. S. C. § 152 Third and Fourth and by 28 U. S. C. §§ 1331 and 1337 in that the matter in controversy exceeds the sum of value of $10,000, exclusive of interest and costs and arises under the laws of the United States and in that the matter arises under an Act of Congress regulating commerce.

4. Section 2, Third and Fourth of the Railway Labor Act, 45 U. S. C. § 152, Third and Fourth provides as follows:

> "Third. Representatives for the purpose of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. Representatives of employees for the purposes of this Act need not be persons in the employ of the carrier, and no carrier shall, by interference, influence, or coercion seek in any manner to prevent the designation by its employees as their representatives of those who or which are not employees of the carrier.
>
> "Fourth: Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of

> the carrier in maintaining or assisting or contributing to any labor organization, labor representative or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees, assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: *Provided* . . ."

5. For many years employees in engine service (i.e., employed as firemen or engineers) have entered engine service as firemen. While working as firemen, they are required to take and to pass a series of examinations for promotion to engineer. After passing such examinations, and after acquiring requisite experience, firemen are promoted to engineer. The need of the service for engineers, however, fluctuates constantly, due to traffic volume and other factors; hence firemen, after being promoted to engineer, will serve as such on some occasions and on other occasions will return to service as firemen. Firemen promoted to engineers, but working as firemen, are called "promoted firemen." Gradually, as a fireman acquires more seniority, he devotes more and more of his time to service as an engineer and less and less to service as a fireman.

6. For many years firemen on the L&N have been represented for collective bargaining purposes by the BLF&E and the engineers by BLE. Because a substantial number of engine service employees work a part of their time as fireman and a part of their time as engineers, it has long been traditional and is now specifically permitted by the Railway Labor Act, Section 2, Eleventh (c), 45 U. S. C. Section 152, Eleventh (c) for engine service employees to be members of either organization. The great bulk of

firemen, however, are members of BLF&E and a majority of the engineers are members of BLE. Some engineers, however, are members of BLF&E and some firemen are members of BLE.

7. In violation of Section 2, Third and Fourth of the Railway Labor Act, L&N and BLE conceived a plan to interfere, influence and coerce the firemen employed by L&N in the free choice of their collective bargaining representatives, to give unlawful assistance to BLE, and otherwise to violate Section 2. Unless restrained and enjoined by the Court from so doing, the L&N and BLE will, by the unlawful means and devices herein set out, ultimately oust BLF&E as the collective bargaining representative of the firemen on the L&N and to replace it by the BLE. The devices utilized by L&N and BLE to achieve these aims are as set forth below.

8. For many months prior to April 28, 1966, and subsequently thereto, there was and continues to be a need for a substantial number of firemen on the various divisions and seniority districts of L&N. L&N, however, contrary to the needs of the service and contrary to its obligations as a common carrier has failed and refused to hire firemen to meet the needs of the service. Had such firemen been hired, they would have been represented for collective bargaining purposes by BLF&E.

9. As more fully alleged below, BLF&E, more than one year prior to April 28, 1966, served a notice on L&N pursuant to Section 6 of the RLA, requesting it to negotiate on a training program for firemen. Nevertheless, as a first step in the plan of L&N and BLE to interfere with the selection of a collective bargaining representative by L&N firemen and to otherwise violate Section 2, Third and Fourth of the Railway Labor Act, L&N and BLE, on April 28, 1966, entered into a purported collective bargaining agreement with respect to "apprentice loco-

motive engineers," a copy of which is attached hereto as Exhibit A. As of April 28, 1966, there was no group of employees on the L&N known as "apprentice locomotive engineers" and no employees certified as such had been employed by the L&N as of that date. From the inception of railroading in the United States and throughout the history of the L&N, firemen were trained to serve as engineers and are the source of engineers for railroads including the L&N. Under the purported agreement, which simply fixes a rate of pay, the L&N purportedly has established an apprentice training program for engineers, although there was and is little need for engineers, on the L&N system, there being an adequate number of promoted firemen to meet L&N's need for engineers. The true purpose of the purported agreement was to secure more employees to act as firemen whose loyalties would be with the BLE, rather than the BLF&E, and who could be counted on as voting for the BLE in any representation election which might thereafter arise for the selection of a collective bargaining representative for the firemen on the L&N system. The said agreement and its implementation, as hereinafter set forth, was and is in violation of Section 2, Third and Fourth of the Railway Labor Act.

10. As a second step in furtherance of their aforesaid plan, L&N, in further violation of Section 2, Third and Fourth of the Railway Labor Act, after entering into the purported agreement of April 28, 1966 for the t raining of engineers without service as firemen, next transferred a number of L&N employees (such as brakemen, switchmen and others) who were not in engine service to jobs as "apprentice locomotive engineers." Under the foregoing agreement, the so-called "apprentice locomotive engineers" were given a short course of instruction and were then assigned for on-the-job training by observing and working with promoted engineers on normal tours of duty

in road and yard service. After some months of such training and passing of examinations the "apprentices" were promoted to engineer. To this date, approximately 64 "apprentices" have been so promoted and additional numbers are now in training.

11. As alleged above, L&N had and has no urgent need for engineers, but did and does have an urgent need for firemen. Accordingly, as a third step in the plan of L&N and BLE, L&N in bad faith disregarded and, in fact, set aside the collective bargaining agreement between BLF&E and L&N in order to place the "apprentices" on the firemen seniority roster.

The collective bargaining agreement between BLF&E and L&N permits L&N, under certain circumstances, to employ as engineers men who have qualified as such on other carriers (Article 26 of the Agreement of January 11, 1929, as amended. A copy of the relevant portions of said Article 26 is attached hereto as Exhibit B). The collective bargaining agreement further provides that a "hired engineer" on the date that he performs his first service as an engineer also acquires a seniority date as a fireman. The provisions of the collective bargaining agreement respecting "hired engineers" were intended to apply and have traditionally always been applied only to engineers who had qualified as engineers and who had been promoted to engineer on another carrier and who had then left its service, or engineers of the L&N transferred from other seniority districts or who previously resigned or had been discharged. All such "hired engineers" had worked as engineers prior to their employment by the L&N. These provisions had been used by L&N only in those circumstances where there was a need for engineers as such on an L&N seniority district. Because L&N had little need in recent years for additional engineers, no "hired engineers" have been employed (with possibly isolated exceptions) for

the last ten to fifteen years. "Hired engineers" have never been used and were not intended to be used as a means of promoting new employees designated as "apprentices" to jobs as engineers. Nevertheless, L&N, in order to achieve its objective of securing firemen status for the "apprentice engineers," applied the "hired engineers" seniority rules to these "apprentices" in its efforts to influence the choice of a collective bargaining representative of the firemen.

12. A "hired engineer," however, could not be called to work as a fireman under Article 26 until he had served at least one day as an engineer. On several seniority districts, in the normal course of events, a man qualified as engineer would be required to wait several years before being called to service as engineer. L&N and BLE deemed it necessary, therefore, to find a device on such seniority districts for L&N to call "apprentice engineers" to engine service on at least one occasion so that they could be given a seniority date as engineer and, hence, as a fireman.

13. Engineers are required to perform two types of work--first, to work on regularly assigned positions on scheduled passenger trains, scheduled freight trains and yard operations which work on fixed shifts; and, second, to work in "pool service." Pool service includes working as engineer on road freight trains which are dispatched from classification yards at any hour of the day or night when a sufficient number of cars have accumulated at a classification yard to be formed into a train. The men in pool service also take the places of engineers on regularly assigned runs who are unable to perform their ordinary duties because of sickness, vacations, personal reasons, etc. On each seniority district, at the end of each semi-monthly period, a count is made of the average number of miles "run" by the men in the pool. Under the BLF&E—L&N collective bargaining agreement, if the average number of miles run by the men in the pool falls below 1,500 miles,

men are removed from the pool and returned to service as firemen. If, however, the average number of miles exceeds 1,800 miles, then men are added to the engineers' pool. In this fashion, the carrier is assured of an adequate number of men in the pool at all times; the number of men in the pool is constantly adjusted so that each man has an opportunity to earn a reasonable wage, and so that no man is required to work an excessive number of hours, to the detriment of the carrier, of the public and the employee himself.

14. As a fourth step in the plan of L&N and BLE, and to achieve the goal of providing instant seniority as firemen for the "apprentices," L&N in bad faith disregarded the foregoing provisions of the collective agreements between BLF&E and L&N carefully prescribing the conditions under which a man may be added to or removed from the engineers' pool. L&N, in bad faith and in complete derogation of such provisions and in violation of Section 2, Third and Fourth of the Railway Labor Act, has repeatedly, artificially and without regard to operating needs increased the number of men in the engineers' pool for short periods of time, for the sole purpose of giving the "apprentices" a seniority date as engineers and as firemen, so as to enable L&N to use such "apprentices" as firemen, and to qualify them to vote in a representative election for the selection of a collective bargaining representative other than the BLF&E. The wrongful course of conduct of L&N is illustrated by the following:

(a) On the Cumberland Valley Division for the second period of July, 1966, L&N increased the number of men in the engineers' pool. Attached hereto as Exhibits C and D are the roster of men assigned to the engineer pool for the Cumberland Valley Division for the second period of July, 1966, and the first period of August, 1966, respectively. Column A lists the names of the men regularly

assigned to the pool and shows the miles run by them during that period. As shown by the notation "A-28" or "A-29", after the names of 13 men on Exhibits C and D these men (all of whom were "apprentices") were added to the list on July 28 and July 29. They remained on the list for only a few days, ran only a few hundred miles and then on July 30 or 31, in some cases, on August 1 or 2, were removed from the pool roster. Removal is indicated by the notation "B-30" or "B-31" on Exhibit C and "B-1" or "B-2" on Exhibit D. Adding the names of these "apprentices" to the pool roster was not required by the needs of the service, but was done solely for the purpose of giving these "apprentices" a seniority date as engineers and, hence, also as firemen. Thereafter, these men were employed as firemen on the Cumberland Valley Division.

(b) In October, 1966, on the Main Stem First Division of the Louisville Division, a substantially similar device was employed for giving six other "apprentices" seniority dates and with it firemen seniority dates. On October 26, 1966, as shown by Exhibit E attached hereto, six apprentices were added to the pool (Van Almon, Wilson, Boaz, Bodkens, Wemes and Monin). These men were subsequently removed from the pool on November 2, 1966, as shown by Exhibit F attached hereto. Said "apprentices" have been placed on the firemen's seniority roster, and have been used as such.

(c) On May 22, 1967, on the Cumberland Valley Division of the L&N, an official of the railroad called engineers on the engineers' pool and requested them to lay off for the 11:00 P.M. shift, so as to make it possible for the railroad to qualify three men as engineers. The three men in question were "apprentice engineers." In response to this request, a number of engineers did lay off. At 11:00 P.M. the same day, ten men were added to the engineers' pool, including the three "apprentice" engineers in

question. As of 3:30 A.M. the next day, the board was reduced by ten men. The three "apprentice" engineers called for duty after 11:00 P.M., and after working only one assignment, thereby, according to L&N and BLE established seniority as an engineer in the Cumberland Valley Division. They have since been used as firemen. Similar devices were used in other divisions at other dates in order to establish seniority dates for "apprentices".

15. As a fifth step in the L&N and BLE plan to interfere with the selection of a collective bargaining representative in violation of Section 2, Third and Fourth of the Railway Labor Act, and in bad faith and in complete derogation of the collective bargaining agreement with the BLF&E, L&N has assigned work to "apprentices" who have secured firemen's seniority dates as above described which should have been assigned to firemen with more seniority and has otherwise discriminated against such firemen in favor of such "apprentices."

16. As a sixth step, L&N has sought to create additional employment opportunities for engineers, and thus permit the employment of additional apprentices at a more rapid rate than normal attrition would provide. To this end, and despite L&N's claim that there is a shortage of engineers L&N has approved heavy payments to engineers eligible to retire as inducements for retirement. A number of engineers have accepted such offers. Thereby it has been possible for L&N more rapidly to employ "apprentices" actually working primarily as firemen, the bulk of whom are members of or sympathetic to BLE.

17. L&N, in addition and as part of the foregoing plan of action, has made clear to the "apprentices" that the BLE is the labor organization which it favors. Among the actions taken in this respect are the following:

a. L&N informed the "apprentices" that the ap-

prentice program was an L&N-BLE sponsored program.

b. The engineers used for training purposes did not represent a cross-section of all L&N engineers, but, rather, where possible, engineers and officers of the BLE known by L&N to be members of BLE and, in particular, local chairmen of BLE. Thus, the apprentices received their training in the course of working primarily with BLE members and BLE local chairmen, rather than BLF&E members. Such BLE members thereby had an exceptional opportunity and utilized the opportunity during the course of the training program, which customarily lasted several months, in which to encourage the "apprentices" to join the BLE.

c. At the conclusion of the apprentice training program, L&N has been conducting a graduation ceremony for each group of apprentice engineers and has been combining the graduation ceremony with a dinner. At these ceremonies and dinner L&N has invited representatives of the BLE to attend, but has not invited representatives of the BLF&E. As a result the "apprentices" are led to infer that the BLE stands in the graces of the company employing them, that the program they have just completed is a joint program between L&N and BLE, that they owe a special debt to BLE for their employment and that, accordingly, it would be to their best interests to join the BLE, even though they will spend a substantial portion of their working careers as firemen and not as engineers.

18. Although the approximately 64 "apprentices" above referred to purportedly have been promoted to engineer, in fact they are working almost entirely as firemen, since there is a need for additional firemen but little need for additional engineers. Yet, of this 64, only six have

joined BLF&E, while the bulk of the remainder, BLF&E alleges on information and belief, have joined the BLE.

19. In violation of the Railway Labor Act, L&N has given assistance and special privileges to BLE and certain of its favored members and has not given such aid and special assistance to BLF&E and its members. By so doing, L&N has demonstrated to the apprentice engineers, and firemen that BLE is the labor organization favored by L&N, that its members receive favored treatment and that its members have superior opportunities for advancement, favors, and privileges. By so doing, L&N encouraged new engineers and firemen to join BLE and encouraged BLF&E members to change their membership from BLF&E to BLE. In consequence new engineers and firemen have joined BLE and BLFE members have dropped their membership and joined BLE. Among the acts of assistance and granting of special privilege are the following:

(a) Under the collective bargaining agreement between L&N and BLE, and between L&N and BLF&E, engineers, after they have operated a locomotive for a specified number of miles during the course of a pay period, are required not to work further during the course of that period in order to give employment opportunities to other engineers and firemen, who have had less work during that pay period. In lieu of stopping work during the course of a particular period an employee who exceeds the mileage limitations may run fewer miles during the succeeding period. L&N, in the case of favored BLE members, permitted them to exceed the mileage limitation during the course of a period, and did not require them to run fewer miles during the succeeding pay period.

(b) About Fall, 1965, prior to the establishment of the apprentice engineer program on April 28, 1966, L&N appointed a BLE local chairman (chairman of a local lodge) as head of a training program for firemen and engineers.

The apparent purpose of the training program was to provide classroom instruction and additional road experience in the handling of locomotives. Additionally the training program is used as device to demonstrate L&N's favoritism to BLE and enable BLE to recruit members. This goal is accomplished by permitting firemen and engineers to attend the program at times when they would not otherwise be working due to mileage limitations and paying them for such attendance. Firemen and enginemen in some cases are permitted to attend the program more than once and some have attended four and five times. The BLE local chairman is given broad discretion in the selection of students, approval of expense reimbursements for attendance, etc. He favors BLE members and BLFE members who he thinks can be persuaded to shift from BLFE to BLE. The delegation of such authority demonstrates to firemen the favored position of BLE in the eyes of L&N and constitutes L&N assistance to BLE.

(c) Favored members of BLE are permitted by L&N to work on behalf of BLE on L&N time and in some cases are credited for mileage not actually operated by them.

(d) L&N has shown favoritism to "apprentices." On occasions reduction of business had reduced the need for engineers and firemen. The "apprentices" serving as junior firemen in the usual course of business would have been furloughed by L&N. Instead, special positions as firemen have been created by L&N for "apprentices" who have completed their training, in order to give special employment opportunities to them. These positions tend to be attractive jobs and to offer special opportunities for these "apprentices" to be called for work as engineers. Additional employment oppportunities have been opened not only in their own seniority districts but also in other seniority districts.

(e) L&N favors "apprentices" who have completed their training and who are working as firemen by seizing every opportunity and creating opportunities to have these men called as engineers. At the East St. Louis yard a special seniority roster was established on or about November 3, 1967, for "apprentices." This special seniority roster will diminish the employment opportunities for firemen in the East St. Louis yards to work as firemen and will diminish the opportunities for firemen who have been promoted to engineer to work as engineers.

21. L&N not only has given aid and special assistance to BLE as alleged above, but also has failed and refused to negotiate in good faith with BLF&E. As set out above, on April 28, 1966, L&N and BLE entered into the purported apprentice agreement. More than 1 year prior thereto, on March 25, 1965, BLF&E served on L&N a notice pursuant to Sec. 6 of the RLA, requesting L&N to negotiate with it regarding the establishment of a training program for firemen, which were then, and continued to be in short supply on L&N. A copy of said notice is attached hereto as Exhibit G. On November 15, 1965, a substantially similar notice was served on most of the other major railroads in the United States. L&N refused to engage in serious negotiations with BLF&E regarding a training program for firemen. In consequence, BLF&E invoked the services of the National Mediation Board (NMB) for purposes of mediation. Mediation on the BLF&E notice was set for August 4, but that day, BLE, to further hamper and delay BLF&E in negotiation for a firemen's training program, filed an action in the U. S. District Court for the District of Columbia (No. 2060-66) which is pending there. L&N has refused to negotiate with BLF&E regarding its firemen training program proposal, even though L&N is obligated to bargain thereon under Section 6 of the RLA. Such acts of L&N and BLE have further served to undermine

BLF&E's influence with the firemen they represent, and otherwise constitute violations of Sec. 2, Second and Third of RLA.

By the acts herein described and other similar conduct, the individual plaintiffs have and will continue to sustain great and irreparable injury to their right to be represented for collective bargaining purposes by the BLF&E, to their right to effective representation by BLF&E without L&N and BLE interference, influence or coercing, and to their right to work without discrimination in accordance with the collective bargaining agreement between the BLF&E and the L&N. Similarly such conduct has and will continue irreparably to injure in a substantial manner the right and duty of the BLF&E to represent for collective bargaining purposes the firemen employed by the L&N. An injunction should be issued by this Court to restrain and enjoin the L&N and the BLE from further engaging in the conduct described in the complaint. Plaintiffs have no adequate remedy at law.

Wherefore, BLF&E prays that this Court

I. Enter a final decree enjoining L&N individually, and L&N and BLE in concert from influencing, interfering, or coercing employees in the selection of their collective bargaining representative. In particular, plaintiffs pray that the court so enjoin L&N and BLE from

A. Directly or indirectly encouraging or facilitating employees to join BLE or to change membership from BLF&E to BLE.

B. Utilizing any device or artifice (such as, but not limited to contraction or expansion of engineer pools, requesting employees not to work) to create work opportunities for any employees or to give any employee a seniority date as a fireman or engineer.

C. Giving preferred assignments as fireman or engineer to any member of BLE or any person being recruited by BLE.

D. Continuing the purported training program for engineers.

E. Employing as "hired engineers" persons who were not bona fide engineers on carriers other than L&N.

F. In any manner violating Sec. 2, Third and Fourth of the RLA.

G. Grant such other relief as the Court deems just.

II. Pending final decree, grant temporarily the relief requested in the permanent decree.

(Signatures of Counsel.)

(Verification.)

[NMB Letter of June 21, 1966. BLE Appendix in No. 17588, 15c.]

NATIONAL MEDIATION BOARD
Washington, D. C. 20572

June 21, 1966

Mr. J. E. Wolfe, Chairman
National Railway Labor Conference
Room 474, Union Station
517 West Adams Street
Chicago, Illinois 60606

Dear Mr. Wolfe:

On June 7, 1966, you advised that the Carriers' Conference Committees and the National Railway Labor Conference were invoking the mediation services of the Board in regard to Section 6 notices served by the Brotherhood of Locomotive Firemen and Enginemen for a training program.

In your telegram of June 7, 1966, you asserted that this dispute involves a jurisdictional issue between the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Locomotive Engineers. You further stated that there cannot be constructive mediation until the Carriers are legally protected in the matter of which of the two organizations is considered the bargaining agent for Apprentice Enginemen for purposes of the Railway Labor Act.

The specific question in dispute as stated in the application dated June 6, 1966, signed by you and the Chairmen of the various Carriers' Conference Committees, was as follows:

"On or about November 15, 1965, the Brotherhood of Locomotive Firemen and Enginemen served a notice under Section 6 of the Railway Labor Act upon railroads represented b ythe Eastern, Western and Southeastern Carriers' Conference Committees and the National Railway Labor Conference, shown on statements attached hereto and made a part hereof marked Exhibits 3, 4, and 5, seeking an agreement covering a training program for apprentice locomotive engineers (a non-existent class for purposes of the Railway Labor Act) as set forth in Exhibit 2, attached hereto and by such reference made a part hereof. The Brotherhood of Locomotive Engineers, in letter dated November 17, 1965, Exhibit No. 1, alleges that it is the proper bargaining agent for the non-existent class if and when such a class is created and, thus, a jurisdictional issue has arisen as to which, by this invocation, the carriers request mediatory services in order that they may be properly and legally informed as to which of the two disputing organizations may legally bargain for and on behalf of Apprentice Locomotive Engineers."

The parties to the dispute as named in the application were:

"Railroads represented by the Eastern, Western, Southeastern Carriers' Conference Committees, respectively, shown on statements attached hereto and made a part hereof, marked Exhibits 3, 4, and 5, the Brotherhood of Locomotive Firemen and Enginemen, and the statutory representative of the class or craft of Locomotive Engineers."

By letter of June 8, 1966, Mr. Gilbert, President of the BLF&E, was asked to comment on this application. His reply was received by telegram June 14, 1966, and copy forwarded to you by wire the same date.

In reviewing Mr. Gilbert's reply, it is noted that he states:

". . . TRAINING NOTICE PROPOSES A TRAINING PROGRAM FOR LOCOMOTIVE FIREMEN—A PROGRAM FOR IMPROVING

THEIR SKILLS IN PREPARATION FOR CERTAIN EXAMINATIONS TO WHICH THEY ARE TO BE SUBJECTED . . . NO JURISDICTIONAL DISPUTE CAN POSSIBLY BE INVOLVED AND THERE IS NO OCCASION WHATEVER FOR DETERMINATION OF REPRESENTATIVES, SINCE THE FIREMEN'S CRAFT IS THE ONLY CRAFT CONCERNED AND THE BLF&E IS THE UNDISPUTED COLLECTIVE BARGAINING REPRESENTATIVE OF THAT CRAFT."

The Brotherhood of Locomotive Engineers have advised us, through their Grand Chief Engineer and Counsel, of their interest in this application. Copies of letters dated June 9, 1966, received from Messrs. Heath and Ross are attached for your information.

These letters indicate the interest of the BLE as the statutory bargaining representative for the craft or class of Locomotive Engineers in the training of Apprentices in that craft or class to skilled employees thereof.

Exhibit 1 attached to your application, which is a letter from Mr. Heath addressed to various carriers, has been carefully reviewed. In that letter, Mr. Heath clearly indicates that the BLE as the designated bargaining representative for the craft or class of Locomotive Engineers has the right and duty to bargain in regard to Apprentice Locomotive Engineers who are part of that craft or class.

Clearly, the above résumé indicates that neither the Brotherhood of Locomotive Enginers nor the Brotherhood of Locomotive Firemen and Enginemen is seeking to extend its jurisdiction beyond the scope of the craft or class of employees they presently represent. Consideration of the contents of your telegram of June 16 does not alter this conclusion.

Your application states that:

> ". . . the carriers request mediatory services in order that they may be properly and legally informed as to which of the two disputing organizations may legally bargain for and on behalf of Apprentice Locomotive Engineers."

The question as posed involved a question of representation. Such issues are resolved under Section 2, Ninth, of the Railway Labor Act. The application dated June 6, 1966, filed by the National Railway Labor Conference and the several Carriers' Conference Committees for the services of the Board under Section 5, First, of the Railway Labor Act, is therefore dismissed.

A copy of your telegram of June 16, 1966, is being forwarded to Mr. Gilbert.

Copies of the pertinent correspondence are being forwarded to the BLE in order that their files may be complete.

Very truly yours,

/s/ THOMAS A. TRACY,
Executive Secretary.

* * * * *

[NBM Letter, July 22, 1966. BLE Appendix in No. 17,588, 50c.]

NATIONAL MEDIATION BOARD
Washington, D. C. 20572

July 22, 1966

Mr. P. S. Heath, Grand Chief Engineer
Brotherhood of Locomotive Engineers
1118 BLE Building
Cleveland, Ohio 44114

Dear Mr. Heath:

On July 1, 1966, the Brotherhood of Locomotive Engineers addressed a telegram to the Board requesting its services pursuant to Section 2, Ninth, of the Railway Labor Act in a dispute involving representation of Apprentice Locomotive Engineers employed by the Louisville and Nashville Railroad.

In the telegram it was pointed out that the Brotherhood of Locomotive Engineers, as the certified representative of the Locomotive Engineers, had entered into an agreement with the Louisville and Nashville Railroad on April 28, 1966, for Apprentice Locomotive Engineers as a part of the craft or class of Locomotive Engineers. It was further stated that the Brotherhood of Locomotive Firemen and Enginemen had raised the question as to the BLE's right to represent Apprentice Locomotive Engineers employed by the Louisville and Nashville Railroad before the United States District Court for the Western District of Kentucky (Civil Action No. 5402).

This telegram was acknowledged and copies transmitted to the Carrier and the BLF&E for comments. The telegram

was supplemented by a letter from the BLE, dated July 5, 1966, copy of which was also furnished to the Carrier and the BLF&E. Subsequently, comments were received from both the carrier and the BLF&E.

Mr. Scholl, Director of Personnel, Louisville and Nashville Railroad, in a letter dated July 11, 1966, states:

> "In compliance with your request that we furnish you a statement of our position in that matter, we wish to advise that, in our opinion, the Brotherhood of Locomotive Engineers represents apprentice locomotive engineers on this railroad and we have accordingly entered into an agreement with that organization relative to such apprentices."

Mr. Gilbert, President of the Brotherhood of Locomotive Firemen and Enginemen, in his letter of July 13, 1966, states:

> "Accordingly, it is clear that what Mr. Heath is asking the Board to do is to extend a right which it now has to represent on the L&N the craft or class of locomotive engineers to embrace employees performing the functions of firemen in violation of the representation rights of this organization and in violation of the rights of the employees to select their own collective bargaining representative."

In the present situation, it is clear that the Brotherhood of Locomotive Engineers has been certified by the National Mediation Board, Case No. R-3225, Certification issued December 31, 1957, as the representative of the craft or class of Locomotive Engineers, employees of the Louisville and Nashville Railroad Company. Neither the carrier nor the Brotherhood of Locomotive Firemen and Enginemen dispute this fact.

It is also clear that the carrier has recognized the Brotherhood of Locomotive Engineers at the representative of the Apprentice Locomotive Engineers, employees of the

L&N Railroad and have entered into an agreement with that organization relative to such apprentices.

Careful scrutiny of the statements received from the Brotherhood of Locomotive Firemen and Enginemen fails to reveal a position that a representation dispute exists.

Section 2, Ninth, of the Railway Labor Act provides:

> "If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier."

Section 2, Ninth, of the Act quoted above authorizes this Board to investigate a dispute to determine the representative of the employees, but under this section of the law, the Board has no authority to decide a jurisdictional dispute as such.

Review of the contentions of all concerned indicates that the dispute, if any exists, is not a representation dispute; but may involve an issue as to the right of the employees of one craft or class to do the work that is alleged to be that commonly done by employees of another craft or class. Procedures other than those outlined in Section 2, Ninth, of the Railway Labor Act are available to settle such disputes.

The Board in executive session July 19, 1966, examined the complete file pertaining to the request received from the Brotherhood of Locomotive Engineers to investigate, pursuant to Section 2, Ninth, of the Railway Labor Act,

a representation dispute among Apprentice Locomotive Engineers as part of the craft or class of Locomotive Engineers. After full consideration of the request and the arguments of the parties in support of their contentions, the Board concludes and hereby finds that no dispute within the meaning of Section 2, Ninth, of the Act exists and that the application of the Brotherhood of Locomotive Engineers should be and is hereby dismissed.

By direction of the National Mediation Board.

THOMAS A. TRACY,
Executive Secretary.

cc: Mr. W. S. Scholl, Director of Personnel
The Louisville and Nashville Railroad Company
908 West Broadway, P. O. Box 1198
Louisville, Kentucky
Mr. H. E. Gilbert, President
Brotherhood of Locomotive Firemen and Enginemen
15401 Detroit Avenue
Cleveland, Ohio 44107

[District Court's Decision in No. 18,479.]

(L&N Appendix 49b-50b.)

By the Court: Gentlemen, the Court is of the opinion that this is not a justiciable controversy for the Court and that action 5134 and 5402 were dispositive of it insofar as this Court's action is concerned.

It would appear to me that to make a determination as to the proselyting of these Union men would require a determination by the Court as to the proper employee representation in these crafts under the agreements which clearly is not a matter for the Court.

He is not familiar with the practice of railroads. He has no expertise in this regard. I feel that no status-quo relief is entitled for the reason that the granting of even status-quo relief without some administrative order upon which to base it—of course, the Court has equitable power to force the L&N to bargain with anybody once there is a determination by somebody qualified as to who they ought to bargain with, and the Court wouldn't hesitate to use its equitability [equitable] power in that regard, but in this instance, there has been no such determination.

Now, the Defendants' motion—each Defendant's motion, is sustained and you will prepare findings of fact and conclusions with copies to Mr. Hogan.

Railway Labor Act, Sec. 2,

"First. It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

"Second. All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

"Third. Representatives, for the purposes of this Act, shall be designated by the respective parties without interference, influence, or coercion by either party over the designation of representatives by the other; and neither party shall in any way interfere with, influence, or coerce the other in its choice of representatives. . . .

"Fourth. Employees shall have the right to organize and bargain collectively through representatives of their own choosing. The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act. No carrier, its officers or agents, shall deny or in any way question the right of its employees to join, organize, or assist in organizing the labor organization of their choice, and it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining, or in performing any work therefor, or to influence or coerce employees in an effort to induce them to join or remain or not to join or remain members of any labor organization or to deduct from the wages of employees any dues, fees,

assessments, or other contributions payable to labor organizations, or to collect or to assist in the collection of any such dues, fees, assessments, or other contributions: . . .

* * * * *

"Seventh. No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class as embodied in agreements except in the manner prescribed in such agreements or in section 6 of the Act.

* * * * *

"Ninth. If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this Act, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this Act. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of representatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and

utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph."

Railway Labor Act, Sections 5 First, and 6, 45 U. S. C. A. §§ 155 First and 156.

SECTION 5. First. The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in Section 10 of this Act) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this Act.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board

shall be created under Section 10 of this Act, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose. . . .

SECTION 6. Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon as required by Section 5 of this Act, by the Mediation Board, unless a period of ten days has elapsed after termination of conferences without request for or proffer of the services of the Mediation Board.

SUPREME COURT, U. S.

FILED
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JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 774

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, - - - - - Petitioner,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, - - - - - - - - Respondents.

B. A. TURNER, ET AL., and
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, - - - - - Petitioners,

versus

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, - - - - - - - - Respondents.

BRIEF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

(See Inside of Cover for List of Attorneys)

WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

JOHN A. SANDIDGE,
WOODWARD, HOBSON & FULTON,
1806 Kentucky Home Life Building,
Louisville, Kentucky 40202,

PHILIP M. LANIER,
JOSEPH L. LENIHAN,
MARVIN E. JONES,
EUGENE W. REETZ,
DAVID M. TRABWOOD,
900 West Broadway,
Louisville, Kentucky 40201,

Counsel for Louisville and Nashville Railroad Company.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 774

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, - - - *Petitioner,*

v.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY, and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, - - - - - - - *Respondents.*

B. A. TURNER, ET AL., and
BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, - - - *Petitioners,*

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LOUISVILLE AND NASHVILLE RAILROAD COMPANY, and
BROTHERHOOD OF LOCOMOTIVE ENGINEERS, - - - - - - - *Respondents.*

BRIEF OF LOUISVILLE AND NASHVILLE RAILROAD COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

OPINIONS BELOW.

The petition in No. 774 in this Court involves two separate suits, being Civil Action Nos. 5402 and 5829 filed in the United States District Court for the Western District of Kentucky. The opinions of the District

Court, in the form of Findings of Fact and Conclusions of Law, dated July 5, 1966 and January 23, 1968, respectively, are not reported but are a part of the original record before this Court (R. No. 5402, Doc. 19, pp. 1-4; R. No. 5829, Doc. 19, pp. 1-10, with Appendices A through D).[1]

Each of the two cases was appealed separately, being Nos. 17,588 and 18,479, respectively, in the United States Court of Appeals for the Sixth Circuit. They were later consolidated for purposes of hearing by the Court of Appeals, and the opinion of the Court of Appeals is reported in 400 F. 2d 572.

JURISDICTION OF THE COURT.

Jurisdiction of this Court to review the decision of the United States Court of Appeals for the Sixth Circuit, entered August 28, 1968, by means of a writ of certiorari is contained in 28 U. S. C. § 1254(1).

STATUTES INVOLVED.

The Railway Labor Act, most of the pertinent sections thereof being printed in the petitioners' appendix (A. 38-41) and an additional section thereof being printed in this respondent's appendix, p. 61, *infra*.

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[1]All references are to the original records of both Civil Action No. 5402 and No. 5829, both of which are before this Court as No. 774 and the original records of which have been filed with the Clerk of this Court pursuant to Rule 21. The pages of the original records are not numbered individually but the Clerk of the District Court did number each document of record. Thus, our record references shall show the civil action involved, the document number and then the page or pages of the document referred to. When an exhibit is involved, the exhibit number or letter will be cited.

COUNTER-STATEMENT OF QUESTIONS PRESENTED FOR REVIEW.

1. Where the complaints of the Brotherhood of Locomotive Firemen and Enginemen (BLF&E) against the Louisville and Nashville Railroad Company (L&N) and the Brotherhood of Locomotive Engineers (BLE) present a direct attack upon a training program for apprentice locomotive engineers involving L&N and BLE, the duly authorized representative of the craft or class of locomotive engineers employed by the L&N and certified as such by the National Mediation Board, and inextricably involve a dispute between the BLE and BLF&E as to which of those organizations has the statutory right to bargain for and in behalf of apprentice locomotive engineers and a dispute concerning the proper interpretation of collective bargaining agreements, does the District Court have jurisdiction of the subject matter of the complaints and is the controversy justiciable as one being appropriate for judicial determination?

2. Does the District Court have jurisdiction to decide the merits of a jurisdictional dispute between the two competing railway unions?

COUNTER-STATEMENT OF THE CASE.

In order that this Court may view the present case in true perspective, we present, as summarily as possible, the facts which gave rise to the filing of each of the complaints below. In this regard, there has been much other litigation among the same parties which

has a real and direct bearing on the present case. Pertinent background is supplied by reported findings of several courts which have decided a series of cases involving the same parties here. Please see initially: *Brotherhood of Locomotive Engineers, et al.* v. *Baltimore & Ohio R. Co., et al.*, 310 F. 2d 503 (C. A. 7, 1962), aff'd. 372 U. S. 284, and *Brotherhood of Locomotive Firemen & Enginemen, et al.* v. *Chicago, Burlington & Quincy R. Co., et al.*, 225 F. Supp. 11 (D.C. D.C., 1964), aff'd. 331 F. 2d 1020 (C.A. D.C., 1964), cert. den. 377 U. S. 918. In addition, the District Court took judicial notice of a series of cases in that Court which involved the same parties, which cases also constitute an important part of the present dispute. We present all these events chronologically, insofar as possible.

The Abolishment of Unnecessary Positions of Locomotive Firemen pursuant to Public Law 88-108 and the Award of Arbitration Board No. 282.[1]

The present dispute had its genesis at least by November 2, 1959, when the nation's railroads, including the L&N, served the railroad operating unions, including the BLE and BLF&E, with notices under Section 6 of the Railway Labor Act (45 U.S.C. § 156). These notices proposed the elemination of obsolete agreement rules requiring the use of firemen on locomotives (other than steam powered) in freight and yard service. Counter-proposals were served by the unions which proposed the use of a fireman on all locomotives.

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[1](R. No. 5402, Doc. 9, Ex. B.)

After unsuccessful negotiations by the parties, the President, by Executive Order 10891, on November 1, 1960, appointed a Presidential Railroad Commission to investigate the controversy and use its best efforts to bring about a settlement. This fifteen-member commission began its hearings on February 16, 1961, and delivered its report and recommendations to the President on February 28, 1962.[1] The commission recommended that rules requiring the use of firemen be abrogated and that, subject to measures for the protection of men already employed, the carriers should be permitted to discontinue firemen's assignments (pp. 48-50). In regard to retaining firemen as the future source of engineers, the Commission stated (p. 45):

> "Engineers have almost universally been promoted from the ranks of firemen who pass qualifying examinations. This fact does not, in itself, however, compel the conclusion that the fireman's job should be retained."

The recommendations of the Presidential Railroad Commission were accepted by the carriers but were rejected by the Unions. Efforts by the National Mediation Board to mediate the dispute were also unsuccessful, and that Board terminated its services on July 16, 1962, after the unions refused a proffer of arbitration under Sections 7 and 8 of the Railway Labor Act (45 U.S.C. §§ 157 and 158). The carriers then served notice that they intended to put their

[1]There were 15,500 pages of oral testimony and thousands of pages of exhibits received by the Commission. The Commission also made numerous studies independently of the parties, and was assisted in its work by a staff of independent technical experts.

proposals into effect, and the unions resorted to litigation aimed at preventing that from being done. In *Locomotive Engineers, et al.* v. *Baltimore & O. R. Co., et al.,* 310 F. 2d 503 (C. A. 7, 1962), aff'd. 372 U. S. 284, this Court reviewed these events and held that the November 2, 1959 Section 6 Notices served by the carriers were valid and the carriers were then free to put them into effect, subject to the possible creation of an emergency board under Section 10 of the Railway Labor Act (45 U.S.C. § 160).

A *second* impartial study in respect to the fireman issue was made by the emergency board later appointed by the President under Section 10. The Report to the President by Emergency Board No. 154, submitted on May 13, 1963, contained recommendations which generally paralleled those made by the Presidential Railroad Commission, except for a suggestion that a special board procedure be utilized in resolving disputes over the use of firemen. These recommendations were accepted by the railroads, but rejected by the unions.

When it became apparent that a disastrous strike was imminent, the President proposed preventive legislation and Congress responded by enacting Public Law 88-108 (45 U.S.C.A. § 157, 1966 Pocket Part). Under the provisions of Public Law 88-108, the fireman issue was to be submitted to arbitration and the arbitration award was to constitute a "complete and final disposition" of the notices involving the fireman issue. The arbitration board was established, with the neutral members from the public being appointed by the President, and is known as Arbitration Board 282. Thus, a

third impartial study of the fireman issue began. After a continuous series of hearings, its Award was filed on November 26, 1963. By the terms of the statute, the Award was to become effective on January 25, 1964, and continue in effect for two years. The validity of Award No. 282 was upheld in *Brotherhood of Locomotive Firemen & Enginemen, et al.* v. *Chicago, Burlington & Quincy R. Co., et al.*, 225 F. Supp. 11 (D.C. D.C., 1964), aff'd. per curiam, 331 F. 2d 1020 (C.A. D.C., 1964), cert. den. 377 U. S. 918, and an excellent summary of the Award appears in the Opinion of the District Court (pp. 16-17).[1] We summarize the pertinent findings of Arbitration Board 282 and its Award.

Section II of the Award modified the existing rules governing the use of firemen so as to permit the eventual elimination of firemen positions on all but 10% of the diesel locomotives in freight and yard service. These remaining firemen positions are commonly referred to as "veto positions." Generous provisions were provided, however, for existing employees. In general, firemen who had less than two years' seniority as of the effective date of the Award could be separated from employment upon the payment of substantial separation allowances, this category of firemen being known as C(2) firemen because of the paragraph of the Award dealing with them. Those firemen with between two and ten years seniority (known as C(6) firemen) could be offered comparable jobs (with five-year guarantees against any reduction in wages and for the payment of relocation expenses) and, if they refused

[1]This Award is also part of the record here (R. No. 5402, Doc. 9, Ex. B).

to accept such comparable jobs offered to them, they could be separated upon the payment of substantial separation allowances. Those firemen with ten years or more of seniority (known as C(7) firemen) were to be retained in the service until they retired, were discharged for cause or otherwise were removed from employment by attrition.[1]

The abolishment of many unnecessary firemen positions on the L&N was accomplished in 1964 in an effective and humane manner. The L&N found comparable positions for many of its existing firemen. Only one C(6) fireman elected to leave its service and take the separation allowance provided by the Award. Although not required by the Award to do so, the L&N re-employed approximately 70% of its C(2) firemen in other positions with the Company after they had been separated from L&N service as firemen and paid generous separation allowances, many of them having been reemployed as brakemen and switchmen and in other crafts (R. No. 5829, Doc. 10, pp. 9, 15-16).

In 1964, the L&N encouraged the retirement of a number of its older firemen and engineers who had already reached the retirement age of 65 or were closely approaching it, by individually offering a very generous separation payment to them. This plan was accepted on an individual basis by a number of its older employees who heartily welcomed it. This also benefited L&N's more junior engineers who moved up

[1]As of March 30, 1966, the railroads had reduced the number of firemen in their employ by about 18,000, and had paid approximately $36,000,000 in separation allowances. *Bangor & Aroostook R. Co.* v. *Brotherhood of L. Enginemen & Firemen*, 253 F. Supp. 682, 685 (D.C. D.C., 1966).

on the seniority rosters to better positions and earnings, and it benefited other existing firemen by making available to them an opportunity to advance to engineers, if qualified (*Ibid.*, pp. 15-16). These separation payments were accorded without regard to any union affiliation (*Ibid.*, p. 16). It also benefited the L&N because it helped to hasten attrition and required it to employ fewer firemen. The L&N spent approximately $2,675,000 pursuant to this plan, which was voluntary on the part of all involved (*Ibid.*, p. 16).

The BLF&E Section 6 Notice of March 25, 1965, to Establish an Apprentice Program on the L&N and the Response of the BLE to The Notice.

On March 25, 1965, the BLF&E served the L&N with a Section 6 Notice demanding that the L&N negotiate with the BLF&E concerning the adoption of a training program for apprentice locomotive engineers[1] (R. 5402, Doc. 16, Ex. A, pp. 1-6; R. 5829, Doc. 10, p. 7). Similar demands were subsequently served by the BLF&E on most of the other railroads of the nation on November 15, 1965 (R. 5402, Doc. 16, pp. 4-5; R. 5829, Doc. 10, p. 7). These Section 6 Notices served by the BLF&E constitute the real crux of the present disputes.

The BLE took the position that the Section 6 Notice of the BLF&E infringed upon the statutory rights of

[1]The parties are in disagreement concerning the import or the proper interpretation of the BLF&E Section 6 Notice. While the BLF&E refers to the notice in its brief (p. 4) as involving only an apprentice program for firemen, the BLE insists that it is a proposed apprentice program for locomotive engineers. We think the BLE is correct and we propose to discuss this in a subsequent part of this brief (pp. 26, 53-54, *infra.*).

the BLE, the duly designated representative for the craft of locomotive engineers on the L&N, and the carrier was informed that the BLE would enforce its statutory rights through appropriate legal measures, including calling a strike, if necessary (R. No. 5402, Doc. 16, p. 5, Ex. B; R. No. 5829, Doc. 10, pp. 7, 18).

L&N's Efforts to Qualify its Existing Firemen for Promotion to Engineer and the BLF&E's Actions in Frustrating Such Efforts.

In 1965, the L&N began experiencing a shortage of qualified engineers (R. No. 5829, Doc. 10, p. 7). L&N attempted to satisfy this need for locomotive engineers by the examination of firemen to determine their qualifications for promotion to engineers (*Ibid.*, Doc. 10, pp. 7-8). The BLF&E protested the L&N's attempt to qualify a number of its existing firemen for eventual promotion, claiming that the L&N was violating Paragraph 20 of Article 26 of the L&N-BLF&E agreement which reads (R. 5829, Doc. 10, p. 8): "Firemen will not be promoted to positions as engineers unless they have had at least 3 years' road experience." The L&N was of the opinion that this provision, originally adopted at the carrier's insistence, could be waived by the carrier in individual cases as had been done in the past. In any event, the L&N's position was that this provision did not relate to the giving of examinations and the qualifying of the firemen as engineers but related only to the timing of promotions (R. 5829, Doc. 10, p. 8). Nevertheless, the BLF&E was so adamant in its position that, in August 1965, it threatened to strike.

Thereupon, the L&N submitted this particular dispute to the National Railroad Adjustment Board, where it presently is pending. Shortly thereafter, the BLF&E commenced an action to maintain the *status quo* in respect to this particular dispute so as to prevent the continued efforts of the L&N to examine firemen looking toward their promotion to engineers until the Adjustment Board decided the dispute. This suit is styled *Brotherhood of Locomotive Firemen & Enginemen* v. *Louisville & N. R. Co.,* and is Civil Action No. 5134, U. S. District Court, Western District of Kentucky, at Louisville (R. 5829, Doc. 10, Ex. A, pp. 1-7). The District Court (Hon. James F. Gordon) entered a temporary restraining order on October 1, 1965, which applies to two seniority districts where approximately 20% of the carrier's engine service employees are assigned. The restraining order became a temporary injunction by consent without further hearing on February 4, 1966 (R. 5829, Doc. 10, p. 8). This action by the BLF&E delayed the examination and promotion of a number of L&N firemen, and will continue to delay the examination and promotion of some additional firemen unless and until the dispute is finally decided in the L&N's favor by the Adjustment Board.[1]

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[1]The action taken by the BLF&E in September of 1965 in protesting and resisting the L&N's action in its efforts to examine and qualify a number of its existing firemen for promotion to engineers was unprecedented on the L&N. The sole interest of the L&N was in having a sufficient number of qualified locomotive engineers to meet the needs of its service in both the immediate and reasonably foreseeable future and union affiliation or lack of it played no part in this. A fireman *or* an engineer may be a member of the BLE *or* the BLF&E, as he may desire. Also, since

(Footnote continued on following page)

The Litigation Deciding the Dispute Concerning the Continued Effect of the Award of Board 282 Under Public Law 88-108.[1]

In *Bangor & Aroostook R. Co.* v. *Brotherhood of L. Firemen & Enginemen,* 253 F. Supp. 682 (D.C. D.C., 1966), the District Court held that the modifications in the carriers' working rules made by the Award pertaining to the employment of firemen and actions taken thereunder created a new status which is to be maintained after the expiration of the Award and until changed by agreement or until the procedures of the Railway Labor Act have been exhausted with respect to valid Section 6 Notices proposing changes in the status thus created. The Court held that, unless otherwise agreed to by the parties, the railroads need not use firemen on engines (other than steam powered) in freight and yard service except as required by Award 282.[2]

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there are no union-shop agreements on the L&N with respect to either of these two crafts, a fireman or an engineer may elect not to be a member of either union (R. No. 5829, Doc. 10, p. 6). Thus, it is manifestly clear, and it has remained undisputed, that the L&N's action in examining and qualifying its existing firemen in the operation of locomotives would not have required a single fireman to drop any membership he may have had in the BLF&E.

[1]We refer to *Bangor & Aroostook R. Co.* v. *Brotherhood of Locomotive Firemen & Enginemen,* 253 F. Supp. 682 (D.C. D.C., 1966), affirmed in part pertinent here *sub. nom. Brotherhood of Railroad Trainmen* v. *Akron & Barberton Belt R. Co.,* 385 F. 2d 581 (C.A. D.C., 1967), cert. den. 390 U. S. 923 (1968).

[2]While the Court of Appeals reversed the District Court as to certain points not pertinent here, it affirmed the ruling of the District Court to the effect that, contrary to the contentions of the Unions, the status created during the 2-year period of the Award was not automatically eroded at the end of that period (385 F. 2d 581, 593-594).

The Apprentice Locomotive Engineer Program Established on the L&N in April, 1966.

Although the BLF&E was still insisting upon the handling of its Section 6 Notice served on the L&N on March 25, 1965 for an apprentice program, the jurisdictional dispute between the BLE and BLF&E concerning the notice remained very much alive at all times.[1] By April of 1966, the L&N's need for qualified locomotive engineers was becoming more acute and it could not await the eventual resolution of the jurisdictional dispute between the two unions (R. No. 5829, Doc. 10, pp. 7, 9, 11). Since the BLF&E had thwarted the L&N's efforts to examine a number of its firemen for eventual promotion to engineers, in order to satisfy its need for engineers, in April of 1966, the L&N, with the cooperation of the BLE, began an apprentice engineer program. During the period of their instruction and training, apprentice locomotive engineers are paid at a rate established by an agreement dated April 28, 1966, between the L&N and the BLE (R. No. 5402, Doc. 9, Ex. A). By this training program *and* by the promotion of qualified firemen where not prevented by the BLF&E, the L&N has been satisfying its operational needs for locomotive engineers (R. No. 5829, Doc. 10, pp. 5, 9).

[1]By the service of similar BLF&E Section 6 Notices on most of the other railroads of the nation on November 15, 1965, this jurisdictional dispute between the BLF&E and BLE has become an enlarged one (R. No. 5829, Doc. 10, p. 18).

Carrier's Efforts to Resolve the Jurisdictional Dispute Between the BLF&E and BLE.

On June 6, 1966, the nation's carriers, including the L&N, filed an application before the National Mediation Board pursuant to Section 5, First (45 U.S.C. § 155, First) seeking to have that Board determine which of the two disputing unions (the BLE or the BLF&E) may legally bargain for and on behalf of apprentice locomotive engineers (R. No. 5402, Doc. 16, Ex. B). After an exchange of correspondence between all parties (the carriers, BLF&E and BLE) with the Board (R. No. 5402, Doc. 16, Ex. B, C), on June 21, 1966, the Board denied the carriers' request for its services, stating that "the question posed involved a question of representation. Such issues are resolved under Section 2, Ninth, of the Railway Labor Act" (R. No. 5402, Doc. 16, Ex. B; R. No. 5829, Doc. 10, p. 19).[1]

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[1]A carrier has no standing or right to institute a proceeding before the National Mediation Board under Section 2, Ninth, involving a jurisdictional dispute between two unions. *Railway Clerks* v. *Employees Association,* 380 U. S. 650 (1965).

The Institution of Civil Action No. 5402 By the BLF&E Against the L&N; BLE's Intervention in the Suit and BLE's Efforts to Have the National Mediation Board Decide the Jurisdictional Dispute Between the Two Unions.

On June 27, 1966, the BLF&E commenced Civil Action No. 5402 in the United States District Court, Western District of Kentucky, at Louisville, by which it sought to permanently enjoin the L&N from continuing the apprentice engineer program (R. No. 5402, Doc. 2, pp. 1-7). On the same day, the BLF&E obtained a temporary restraining order (*Ibid.*, Doc. 5, pp. 1-2).

On June 30, 1966, the BLE sought to invoke the services of the National Mediation Board pursuant to Section 2, Ninth, to determine which union, the BLE or the BLF&E, represents apprentice locomotive engineers on the L&N (*Ibid.*, Doc. 16, Ex. D). A hearing on the motion for a temporary injunction and other motions was held in Civil Action 5402 on July 2, 1966 (*Ibid.*, Doc. 17, pp. 1-2; Supp. Rec., TR., pp. 1-37), at which time Judge Gordon announced his ruling from the bench and ordered the submission of formal Findings of Fact and Conclusions of Law (*Ibid.*, Doc. 17, pp. 1-2). The BLE was permitted to intervene and, on July 5, 1966, the Court's Findings of Fact, Conclusions of Law and Judgment were entered in Civil Action No. 5402 (*Ibid.*, Doc. 18, 19).

The District Court concluded (*Ibid.*, Doc. 19, pp. 3-4):

> "By virtue of the foregoing Findings of Fact, the Court concludes as a matter of law that this action involves a controversy between BLF&E and BLE, each of which is a labor organization within the meaning of the Railway Labor Act, as to which of those organizations is the exclusive bargaining representative for and in behalf of the apprentice locomotive engineers employed by the L&N and this Court has no jurisdiction to determine that controversy, the determination of which is exclusively within the jurisdiction of the National Mediation Board. *Brotherhood of Ry. & S. S. Clerks* v. *United Air Lines,* 325 F. 2d 576 (C. A. 6, 1963)."

Accordingly, the restraining order was dissolved and this action was dismissed on July 5, 1966 (*Ibid.*, Doc. 18, 19).

On July 5, 1966, the BLE wrote to the Mediation Board supplementing its earlier telegraphic invocation of the Board's services pursuant to Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth). The Board requested statements from the L&N and the BLF&E concerning the dispute and, on July 11, 1966, the L&N advised the Board that, in the carrier's opinion, the BLE represents apprentice locomotive engineers on the L&N and that the L&N had accordingly entered into an agreement with the BLE relative to such apprentices (A-34, Petitioners' Appendix).

On July 13, 1966, Mr. H. E. Gilbert, President of the BLF&E, wrote the Mediation Board and, while taking the position there that the BLE was attempting

to extend its rights into the firemen's craft, took the position that the Mediation Board should deny the BLE's application for the Mediation Board to decide the dispute between the two unions (A-34; R. No. 5829, Doc. 10, p. 20).

On July 14, 1966, the BLF&E filed a motion for rehearing and new trial in Civil Action No. 5402 (R. No. 5402, Doc. 21, 22). The District Court permitted time for filing of briefs and set the motion for oral argument on September 29, 1966 (*Ibid.*, Doc. 23-26).

On July 22, 1966, the Executive Secretary of the National Mediation Board wrote the parties, in pertinent part, as follows (A. 34-36):

> "In the present situation, it is clear that the Brotherhood of Locomotive Engineers has been certified by the National Mediation Board, Case No. R-3225, Certification issued December 31, 1957, as the representative of the craft or class of Locomotive Engineers, employees of the Louisville and Nashville Railroad Company. Neither the carrier nor the Brotherhood of Locomotive Firemen and Enginemen dispute this fact.
>
> "It is also clear that the carrier has recognized the Brotherhood of Locomotive Engineers as the representative of the Apprentice Locomotive Engineers, employees of the L&N Railroad and have entered into an agreement with that organization relative to such apprentices.
>
> "Careful scrutiny of the statements received from the Brotherhood of Locomotive Firemen and Enginemen fails to reveal a position that a representation dispute exists.
>
> . . . . . .

> ". . . After full consideration of the request and the arguments of the parties in support of their contentions, the Board concludes and hereby finds that no dispute within the meaning of Section 2, Ninth, of the Act exists and that the application of the Brotherhood of Locomotive Engineers should be and is hereby dismissed."

Thus, at the time of the oral hearing on September 29, 1966, on the BLF&E's motion for rehearing and new trial in Civil Action No. 5402, the District Court was aware of the Mediation Board's dismissal of the BLE's application. The District Court, nevertheless, adhered to its first opinion that the crux of the dispute was a jurisdictional one between the two Unions and that the federal courts have no jurisdiction to decide such disputes. Accordingly, the District Court, after having received briefs and having heard oral arguments, entered its order of September 29, 1966, overruling the BLF&E's motion for rehearing and new trial (R. No. 5402, Doc. 27).

The BLF&E then filed its Notice of Appeal in Civil Action No. 5402, and this case became No. 17,588 in the Court of Appeals for the Sixth Circuit (*Ibid.*, Doc. 28).

The Institution of Civil Action No. 2060-66 in the United States District Court for the District of Columbia by the BLE against the National Mediation Board, the BLF&E, the L&N and Other Named Carriers.[1]

After the National Mediation Board dismissed the application of the BLE to decide the jurisdictional dispute between the BLE and BLF&E, the BLE, on August 4, 1966, instituted Civil Action No. 2060-66 in the United States District Court for the District of Columbia. Named as defendants in this civil action were the National Mediation Board, BLF&E, L&N and five other railroad carriers. The BLE alleged in its complaint that, by the BLF&E's Section 6 Notice served upon the L&N on March 25, 1965 and served upon the other railroads on November 15, 1965, the BLF&E was attempting to invade the craft jurisdiction held exclusively by the BLE by virtue of the BLE's certification as the duly authorized collective bargaining representative for the craft or class of locomotive engineers and that the BLF&E's Section 6 Notices were invalid. The BLE sought, among other things, a mandatory injunction to compel the National Mediation Board to exercise and fulfill the obligations

[1]We refer now to *Brotherhood of Locomotive Engineers* v. *National Mediation Board, et al.*, the District Court's Findings of Fact and Conclusions of Law entered April 26, 1968, being reported at 284 F. Supp. 344. The District Court ruled, among other things, that the jurisdictional dispute which existed between the BLE and BLF&E was one for the National Mediation Board pursuant to its power and duty under Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth) and the Court directed the Mediation Board to take jurisdiction and decide the dispute. The case is presently on appeal in the Court of Appeals for the District of Columbia.

imposed upon the Board by Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth), that is, to determine the jurisdictional dispute between the BLE and BLF&E and decide which labor organization has the right to bargain for apprentice locomotive engineers on the defendant railroads. The BLE also sought to enjoin all negotiations concerning such Section 6 Notices until the National Mediation Board determined the jurisdictional dispute between the BLE and the BLF&E (R. No. 5829, Doc. 9, Ex. A).

BLF&E's Attempt to File a "Supplement and Second Amendment to Complaint" in Civil Action No. 5134, U. S. District Court for the Western District of Kentucky.

The BLF&E, in August of 1967, attempted, for the second time, to have the United States District Court for the Western District of Kentucky litigate the dispute arising out of the April 28, 1966, L&N-BLE apprentice engineer agreement and the implementation of this apprentice engineer training program. It was on or about August 18, 1967, when the BLF&E sought leave of court to file a "Supplement and Second Amendment to Complaint" in Civil Action No. 5134 in that Court at Louisville, Kentucky (R. No. 5829, Doc. 19, Ex. C). The L&N objected to the filing of such a proposed pleading and the BLE sought leave of court to intervene in the suit. Arguments on all pending motions were heard by the Court on September 28, 1967, and the District Court, again relying upon the principles of the decision in *Brotherhood of Ry. & S. S.*

Clerks v. *United Air Lines*[1] and cases cited therein, looked to the substance of this BLF&E pleading and the relief sought therein and held that the real controversy involved a jurisdictional dispute between the two Unions; that the proposed amendment to the complaint involved the lawfulness of the apprentice engineer program, the validity of which depended entirely upon the resolution of the jurisdictional dispute, and that the jurisdictional dispute was one for administrative, not judicial, determination (R. No. 5829, Doc. 19, App. D). The District Court recognized that the prior suit (Civil Action No. 5402; Appeal No. 17,588) was cast in the form of an action under Section 2, Seventh of the Railway Labor Act and that the proposed amendment in Civil Action No. 5134 was cast in the form of an action under Section 2, Third and Fourth of that Act. Judge Gordon stated (R. No. 5829, Doc. 19, App. D, pp. 4-5):

> "As this Court sees it, the matter sought to be injected now in action 5134 was the matter heretofore adversely determined to the firemen in its case now under appeal. As I see it the gist of the issue is the same, that is, the apprentice engineer training program.
>
> "Its rightful existence and who is the proper representative and from whence the personnel shall come are matters of administrative, not judicial, determination. Once determined administratively, then action by the BLF&E vs. the railroad alleging violation of 2-3rd and 4th or 2-7th

[1]This case is reported at 325 F. 2d 576 (C. A. 6, 1963), and is discussed in this brief (pp. 35-36, *infra*.)

would of course find instantaneous receipt by this Court for relief, for only then does the judicial remedy become plain, the enforceable obligation having become fixed, but this Court has no jurisdiction to determine the craft dispute. Accordingly, IT IS ORDERED that the motion for leave to file the supplemental complaint is overruled."

The Institution of Civil Action No. 5829 by the BLF&E Against the L&N and the BLE.

On December 22, 1967, the BLF&E instituted Civil Action No. 5829 in the United States District Court for the Western District of Kentucky, at Louisville (R. No. 5829, Doc. 2). The complaint in this action purports to present the same cause of action as presented a few months earlier in the proposed "Supplement and Second Amendment to Complaint" in Civil Action 5134. Actually, the two complaints are substantially the same except that in this new suit some individuals have been joined as plaintiffs and the BLE is also named as a defendant. The BLF&E filed a motion for a preliminary injunction (*Ibid.*, Doc. 8). The L&N filed its answer (*Ibid.*, Doc. 10) and filed a motion to dismiss (*Ibid.*, Doc. 6). The BLE also answered (*Ibid.*, Doc. 9) and also filed a motion to dismiss (*Ibid.*, Doc. 5).

Arguments were heard by the District Court (Hon. James F. Gordon) on January 8, 1968. The Court again recognized the complaint as one attempting to get the Court to decide the merits of the jurisdictional dispute between the two unions since such a dispute was the *very essence* of the controversy (A. 37). The

Court announced its rulings, both orally (R. No. 5829, Doc. 15) and in a written order entered January 8, 1968 (*Ibid.*, Doc. 11), that the Court's earlier Opinions in Civil Actions Nos. 5134 and 5402 were dispositive of the current suit, that the complaint did not present a justiciable controversy for the Court, and that the Court was without jurisdiction, and sustained the motions to dismiss the complaint (*Ibid.*, Doc. 11).

Findings of Fact and Conclusions of Law were served and tendered by both the BLF&E and the L&N (*Ibid.*, Doc. 16, 17) and a further hearing was held concerning them on January 23, 1968, after which the Court entered its Findings of Fact, Conclusions of Law and Judgment (*Ibid.*, Doc. 19) from which the BLF&E appealed (*Ibid.*, Doc. 20).

The two cases appealed by the BLF&E (Civil Action No. 5402, which became Appeal No. 17,588, and Civil Action No. 5829, which became Appeal No. 18,479), although separately briefed in the Court of Appeals, were consolidated for argument in that Court and decided together. Both cases are included in No. 774 in this Court.

SUMMARY OF ARGUMENT.

The petition for a writ of certiorari should be denied because the Courts below correctly determined that the complaints presented a direct attack upon the validity of the L&N-BLE apprentice engineer agreement and program, the validity of which depends entirely upon the resolution of a jurisdictional dispute between the BLE and BLF&E. The Courts below correctly held that such a jurisdictional dispute is one for administrative determination, and that the federal courts have no jurisdiction to decide the merits of such a dispute.

There can be no real doubt about the fact that a serious dispute exists between the BLE and the BLF&E as to which organization has jurisdiction to represent apprentice locomotive engineers employed by the L&N. Completely underlying each of the complaints below, and inextricably the *vital* part of them, is this jurisdictional dispute between the two unions.

This Court, in *General Committee* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323 (1943), defined the term "jurisdictional dispute" as (pp. 334-335):

> ". . . . an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority."

Since April of 1966, the L&N has been satisfying its need for locomotive engineers from two sources: (1) by

the training, examining, qualifying and promoting existing L&N firemen to locomotive engineers *and* (2) by the engineer apprentice training program between the L&N and the BLE, the latter labor organization being the duly designated collective bargaining representative for the craft or class of locomotive engineers on the L&N and certified as such by the National Mediation Board (R. No. 5402, Doc. 19, p. 2). The BLE recognizes both of these sources as valid. However, the BLF&E aspires to represent to the *complete exclusion* of the BLE *every* individual who would become a locomotive engineer on the L&N and to establish the standards and qualifications of a locomotive engineer. The BLF&E has been persistent in its efforts to get the District Court to adjudge as invalid and to enjoin the entire apprentice engineer program between the L&N and BLE, and the BLF&E has been equally persistent in dodging and resisting any administrative determination of the dispute.

The BLF&E contends that the BLE has extended its rights into the firemen's craft; that this was commenced with the L&N-BLE apprentice engineer program in April of 1966; and that the L&N has wrongfully declined to negotiate with the BLF&E concerning its Section 6 Notice of March 25, 1965, concerning the adoption of a training program for apprentice locomotive firemen. (Please see pp. 9-10, *supra.*) The BLF&E Section 6 Notice of March 25, 1965, is in reality a proposal to negotiate an apprentice locomotive engineer training program agreement (R. No. 5402, Doc. 9, Ex. A. pp. 1-7). Although BLF&E contends

that its Section 6 Notice is merely one for the purpose of training firemen, we believe that an examination of this BLF&E Section 6 Notice by the Court will satisfy it that what is really proposed is an agreement pertaining to the training of apprentice locomotive engineers. It is designated as an "Apprenticeship Training, Qualification and Promotion Program for Engine Service Employees" (*Ibid.*, p. 1). There is no separate and individual craft or class of employees known as "engine service" employees. "Engine Service" employees include both firemen *and engineers.* The Section 6 Notice patently seeks to establish an apprenticeship training program for one to become an engineer. Euphemistic titles of "student locomotive helper, locomotive helper trainee and locomotive helper (qualifying for promotion)" are used in the Section 6 Notice. Article C of the Notice provides that these terms are synonymous with the term "firemen" (*Ibid.*, pp. 6-7). However, a locomotive helper (qualifying for a promotion) is one undergoing final stages of training to qualify for promotion to locomotive engineer (*Ibid.*, pp. 5-7), and when he completes such training, Article E of the Notice provides that he shall receive a seniority date as a locomotive engineer (*Ibid.*, p. 7). We submit that, stripped of its obscurantist titles, this Section 6 Notice pertains to an apprenticeship training program for locomotive engineers.

The BLE, on the other hand, contends that, as the duly certified representative of the craft or class of locomotive engineers on the L&N, it has the *statutory*

right to negotiate and formulate with the carrier the standards for qualifying locomotive engineers and the training for attaining such status. In fact, as we have pointed out previously herein (pp. 9-10), the BLE notified the L&N that the BLF&E Section 6 Notice infringed upon the statutory rights of the BLE and that the BLE would enforce its statutory rights through appropriate legal measures, including calling a strike, if necessary.

When each of two labor organizations claims that the other is seeking to expand its authority into an area of craft composition or authority claimed for itself, as here, there is presented a classic case of a jurisdictional dispute. Also, insofar as the BLF&E's claim to exclusivity is seriously contended to derive from its collective bargaining agreements with the L&N, a contention which we emphatically dispute,[1] there is also involved a dispute, equally a jurisdictional one, concerning the proper interpretation of the collective bargaining agreements.

The District Court was not precluded from looking through form to substance in determining the real nature of the controversy before it. *Brotherhood of Ry. Clerks* v. *United Air Lines, Inc.,* 325 F. 2d 576 (C.A. 6, 1963), cert. granted 377 U. S. 903 (1964), cert. dismissed as improvidently granted 379 U. S. 26 (1964). The District Court also properly took judicial notice of the prior litigation before it involving the same parties. *Cf. Howard* v. *St. Louis-San Francisco Ry. Co.,* 361 F. 2d 905 (C.A. 8, 1966), cert. den. 385 U. S. 986 (1966). The District Court also had the right to

[1]This subject is dealt with in some detail at pages 45-52, *infra.*

rely upon undisputed statements of counsel made to the Court concerning the proceedings involving the same parties before the National Mediation Board and the United States District Court for the District of Columbia in Civil Action No. 2060-66. *Oscanyan* v. *Arms Company,* 103 U. S. 261 (1880), cited and relied upon in *Rhoades, Inc.* v. *United Air Lines, Inc.,* 340 F. 2d 481 (C.A. 3, 1965); *United States Hoffman Machinery Corp.* v. *Richa,* 78 F. Supp. 969 (W.D. Mo., 1948). The District Court was also cognizant of the general background of the national "work-rules" dispute as reflected in reported decisions of other federal courts involving the same parties and previously discussed herein (pp. 4-9, 12-13).

The complaints in both civil actions are founded upon an incorrect assumption by the BLF&E that it has the *exclusive* right to bargain with the L&N in respect to apprentice engineers and in setting of standards and qualifications of locomotive engineers.

In the July 2, 1966, hearing before the Court in Civil Action No. 5402, and in referring specifically to the L&N-BLE apprentice engineer agreement, BLF&E counsel candidly stated (Supp. R. No. 5402, Tr., p. 11):

> ". . . That contract is not valid until the Mediation Board says either the BLE is the bargaining representative for men in the engineers' training program, or it is not. . . ."[1]

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[1]In respect to which administrative body has jurisdiction to decide the BLF&E-BLE dispute, this position of BLF&E counsel was consistent with the National Mediation Board ruling in respect to this dispute, which ruling was made about two weeks previous to this July 2, 1966 statement by BLF&E. The Mediation Board, on June 21, 1966, denied the carriers' application under Section 5,

(Footnote continued on following page)

We respectfully submit that the present litigation would require the District Court to do one or the other, or both, of the following:

> (1) require the District Court to determine the merits of a jurisdictional dispute of a representational nature between the two unions, which type of dispute is within the exclusive jurisdiction of the National Mediation Board, *General Committee* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323 (1943); *Brotherhood of Railway and S. S. Clerks* v. *United Air Lines,* 325 F. 2d 576 (C.A. 6, 1963), cert. granted 377 U. S. 903 (1964), cert. dismissed 379 U. S. 26 (1964);
>
> (2) require the District Court to determine the merits of the dispute over the proper interpretation of collective bargaining agreements, which type of dispute is within the exclusive primary jurisdiction of the National Railroad Adjustment Board, *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239 (1950); *Order of Ry. Conductors* v. *Southern Ry. Co.,* 339 U. S. 255 (1950); *Pennsylvania R. Co.* v. *Day,* 360 U. S. 548 (1959); *T.-C.E. Union* v. *Union Pacific R. Co.,* 385 U. S. 157 (1966).

We believe that this Court, in *General Committee* v. *Missouri-Kansas-Texas R. Co., supra,* has taken a broader view of the Mediation Board's jurisdiction

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First of the Railway Labor Act (45 U.S.C. § 155, First) seeking to have that Board determine the jurisdictional dispute between the two unions. The Mediation Board stated that ". . . the question posed involved a question of representation. Such issues are resolved under Section 2, Ninth, of the Railway Labor Act." (Please see p. 14, *supra.*)

under Section 2, Ninth than does the Mediation Board (*Ibid.*, p. 336), and that the Mediation Board has the statutory duty under this section to decide this jurisdictional dispute between the BLF&E and the BLE. This position is also supported by the legislative history of Section 2, Ninth (*Ibid*; please see, also, pp. 43-44, *infra.*).

In any event, whether the jurisdictional dispute involved in the present case is one for resolution by the Mediation Board under § 2, Ninth, is not at all crucial to the correctness of District Court's action in dismissing the complaints for lack of the Court's jurisdiction. If it is not embraced within the ambit of Section 2, Ninth, then the dispute is a jurisdictional one within the exclusive primary jurisdiction of the National Railroad Adjustment Board under § 3, First (i) of the Railway Labor Act, and the District Court did not have jurisdiction to determine the merits of such a dispute.

Petitioners rely (Pet., pp. 12-13) upon *Texas & N. O. R. Co.* v. *Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548 (1930), and *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515 (1937). We point out that neither of these cases involved the problem of a jurisdictional dispute between two competing unions. This Court distinguished these two cases upon this basis in the *M. K. T.* case (320 U. S. 323, 335). If the BLF&E had been certified by the Mediation Board as the representative of apprentice locomotive engineers on the L&N and, if the L&N had then negotiated with the BLE and refused to negotiate with the

BLF&E then a situation analogous to that in the *Virginian Ry. Co.* case would be present.

The other cases relied upon by BLF&E: *Fibreboard Corp.* v. *NLRB,* 379 U. S. 203 (1964); *United Industrial Workers of Seafarers* v. *Bd. of Trustees of Galveston Wharves,* 351 F. 2d 185 (C.A. 5, 1965); *Brotherhood of Railroad Trainmen* v. *Central of Ga. Ry. Co.,* 305 F. 2d 605 (C.A. 5, 1962); *Order of Railroad Telegraphers* v. *Chicago & Northwestern Ry. Co.,* 362 U. S. 330 (1960); and *Rutland Railway Corp.* v. *Brotherhood of Locomotive Engineers,* 307 F. 2d 21 (C.A. 2, 1962), have no application to the issues before this Court since they do not even remotely involve an inter-union jurisdictional dispute as to the craft lines of two unions representing separate crafts on a single employer railroad, as does the instant litigation.

Thus, decisions of the Courts below are not inconsistent with applicable decisions of the Courts of Appeals of other circuits. To the contrary, the decisions below are consistent with the decisions of other circuits dealing with craft line determinations and inter-union jurisdictional disputes which hold that the federal courts have no jurisdiction to decide the merits of such disputes. Please see, *e.g., Division No. 14, Order of Railroad Telegraphers* v. *Leighty,* 298 F. 2d 17, 19 (C.A. 4, 1962), cert. den. 369 U. S. 885 (1962); *Ruby* v. *American Air Lines, Inc.,* 323 F. 2d 248 (C.A. 2, 1963), cert. den. 376 U. S. 913 (1964); *Howard* v. *St. Louis-San Francisco Ry. Co.,* 301 F. 2d 905, 908 (C.A. 8, 1966), cert. den. 385 U. S. 986 (1966), and

Southern Pacific Co. v. *Switchmen's Union of North America,* 356 F. 2d 332 (C.A. 9, 1966).

The decisions below are correct. No unsettled question of importance is actually presented, and there is no conflict of decisions. Accordingly, a writ of certiorari should not issue.

ARGUMENT.

REASONS FOR DENYING THE WRIT.

The Decision of the Courts Below Correctly Follows Prior Decisions of This Court Holding That the Courts Lack Jurisdiction Under the Railway Labor Act to Decide Jurisdictional Disputes Between Two Railway Labor Unions.

There can be no real doubt about the fact that a serious dispute exists between the BLE and the BLF&E as to which organization has jurisdiction to represent apprentice locomotive engineers employed by the L&N. Completely underlying each of the complaints below, and inextricably the *vital* part of them, is this jurisdictional dispute between the two unions.

The District Court was not precluded from looking through form to substance in determining the real nature of the controversy before it. *Brotherhood of Ry. Clerks* v. *United Air Lines, Inc.,* 325 F. 2d 576 (C.A. 6, 1963), cert. granted 377 U. S. 903 (1964), cert. dismissed as improvidently granted 379 U. S. 26 (1964). The District Court also properly took judicial notice of the prior litigation before it involving the same parties. *Cf. Howard* v. *St. Louis-San Francisco Ry.*

Co., 361 F. 2d 905 (C.A. 8, 1966), cert. den. 385 U. S. 986 (1966). The District Court also had the right to rely upon undisputed statements of counsel made to the Court concerning the proceedings involving the same parties before the National Mediation Board and the United States District Court for the District of Columbia in Civil Action No. 2060-66. *Oscanyan* v. *Arms Company,* 103 U. S. 261 (1880), cited and relied upon in *Rhoades, Inc.* v. *United Air Lines, Inc.,* 340 F. 2d 481 (C. A. 3, 1965); *United States Hoffman Machinery Corp.* v. *Richa,* 78 F. Supp. 969 (W.D. Mo., 1948). The District Court was also cognizant of the general background of the national "work-rules" dispute as reflected in reported decisions of other federal courts involving the same parties and previously discussed herein (pp. 4-9, 12-13).

It is obvious that the present complaints involve a jurisdictional dispute between the BLF&E and BLE as to which union has the right to negotiate an agreement for apprentice locomotive engineers on the L&N. This is not a dispute over which the courts have jurisdiction.

While BLF&E has thinly veiled its true purpose in Civil Action No. 5402 by artfully drawing a complaint contending that the L&N violated Section 2, Seventh of the Railway Labor Act (45 U.S.C. § 152 Seventh) by inaugurating the apprentice locomotive engineer training program, its true purpose was revealed through its counsel before the District Court on July 2, 1966. BLF&E counsel stated (Supp. R. No. 5402, TR., p. 9):

> "We are asking, on the merits of our complaint, to enjoin the carrier from putting into effect an

engineers' training program which we say is in violation of the Railroad Labor Act. That is the simple issue here—just as simple as it can be."

Going further, BLF&E counsel stated (*Ibid.*, pp. 10-11):

"I want to say this; he mentioned the contract with the carrier and BLE respecting these engineer trainees. We are made aware today of an application to the Mediation Board under Section Six, Two Ninth, to have the engineers declared the bargaining representative of and for these apprentice engineers. That representation may or may never come about. In other words, under Section Six, Two Ninth, there are certain procedures that have to be followed.

"Now, we say that if they have a contract as they say they have with the BLE, that is not a valid contract because the BLE has not been, at this point, designated as the bargaining representative for apprentice trainee engineers.

. . . . . .

"In other words, as of now, the BLE, so far as representing the engineers in the engineers' training, or men in the engineers' training program, is just a non-entity. It does not exist and I don't care what they say about a contract. *That contract is not valid until the Mediation Board says either the BLE is the bargaining representative for men in the engineers' training program, or it is not.* In other words, this action of intervention is now premature unless and until the Mediation Board has passed upon their application for representation." (Emphasis added.)

The District Court in the present cases was in precisely the same position as was the District Court in the case of *Brotherhood of Ry. and S.S. Clerks* v. *United Air Lines, Inc., supra.* In that case the union allegedly sought a determination by the District Court concerning the validity of a collective bargaining agreement. There, as here, the District Court looked through form to substance and held that the threshold question involved an inter-union jurisdictional dispute over which the Court had no jurisdiction because of the trilogy of cases dealing with this subject: *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297 (1943); *General Committee* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323 (1943); *General Committee* v. *Southern Pacific Co.,* 320 U. S. 338 (1943).

In dealing with the sham pleading of the plaintiff in the *United Air Lines* case, the Court of Appeals stated (325 F. 2d at p. 579):

> "By skillful pleading in this case, appellant has tried to avoid the consequences of these three Supreme Court decisions above cited, which clearly otherwise would be controlling. Appellant contends that the complaint does not ask for an adjudication of a dispute concerning representation rights, but involves a dispute between the representative of employees and a carrier concerning the latter's obligations.
>
> ". . . Looking through form to substance, we agree with the District Court that, although the suit is cast in the form of an action under the law of contracts, it in fact involves a representation

> dispute. Even though an action is brought as one sounding in contract the courts have no jurisdiction 'where "validity" of the contract depends upon the merits of a representation dispute'."

The essential holding of that case was that the mandates of the trilogy of Supreme Court cases cannot be avoided by artfully phrasing a complaint to state a cause of action not founded on the true dispute. There, as here, the basic question concerned the right to represent employees under the Railway Labor Act, and the courts properly look through form to substance in reaching the true nature of such a controversy.

The complaint in Civil Action No. 5829 also attacks the validity of the L&N-BLE apprentice engineer agreement and its implementation (A. 13-28). The BLF&E contends there that the L&N-BLE apprentice engineer program constitutes a violation of Section 2, Second, Third and Fourth of the Railway Labor Act (45 U.S.C. § 152, Second, Third and Fourth). This complaint is similarly founded upon an incorrect assumption by the BLF&E that it has the *exclusive* right to bargain with the L&N in respect to apprentice engineers and in the setting of standards and qualifications of locomotive engineers.[1] Thus, the threshold question presented by this second suit is the jurisdictional dispute between the BLF&E and the BLE.

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[1]There are other patently erroneous assumptions on the part of the BLF&E. For example, the second suit is predicated upon the erroneous and unfounded assumption that the L&N's need all along has been for firemen and not engineers (A. 16-17). We say that this is a patently absurd contention in view of the findings and ruling of Arbitration Board 282 that 90% of the fireman positions in road freight and yard service were unnecessary and could be abolished in accordance with the Award.

Shortly after the effective date of Award 282, in 1964, the L&N did offer a substantial lump-sum payment for voluntary retirement to a number of its older firemen and engineers, who heartily welcomed and encouraged such a program (please see pp. 8-9, *supra*). When the L&N began experiencing a shortage of qualified engineers in 1965, it first attempted to satisfy this need by the training and examination of its remaining firemen in order to qualify them for promotion to engineers (*Ibid.*, pp. 10-11). When the BLF&E resisted this L&N effort and, through the filing of Civil Action No. 5134, partially thwarted this program, it became necessary for the L&N to rely also upon other sources for obtaining qualified locomotive engineers (*Ibid.*, p. 13). By April of 1966, the L&N's need for engineers became so acute that it could not await the eventual resolution of the jurisdictional dispute between the BLF&E and the BLE and, in order to satisfy its need for engineers, it commenced the apprentice engineer program with the agreement and cooperation of the BLE, the duly certified representative of locomotive engineers on the L&N (*Ibid.*, pp. 13-14).[1] By this apprentice engineer program *and* by the promotion of qualified firemen where not prevented by the BLF&E, the L&N has been satisfying its operational needs for qualified locomotive engineers (*Ibid.*, pp. 13-14).

It is therefore apparent that the BLF&E complaint that L&N refused to bargain about its Section 6

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[1]The L&N was not required to await a resolution of the dispute before making the 1966 agreement. Please compare *Ruby* v. *American Airlines, Inc.*, 323 F. 2d 248, 254 (C. A. 2, 1963), cert. den. 376 U. S. 913 (1964).

Notice for the training of apprentice locomotive engineers is founded upon L&N's determination that, under the Railway Labor Act, it was required to negotiate such an agreement with the BLE. From this L&N decision has flowed the existing apprentice locomotive engineer training program conducted with the assistance of the BLE, the bargaining agent recognized by L&N as the labor organization having that statutory right under the Railway Labor Act. We are therefore faced with a classical example of the kind of dispute this Court has held to be not for judicial determination.

As was stated in *General Committee* v. *Missouri-Kansas-Texas R. Co.,* 320 U. S. 323 (1943), where the dispute involves the authority of two railroad unions to represent certain employees in collective bargaining, the issues "are not justiciable—that is to say that Congress by this Act [Railway Labor Act] has foreclosed resort to the courts for enforcement of the claims asserted by the parties" (p. 327-328).

In defining the kind of dispute that is not appropriate for resolution in the federal courts, this Court stated (p. 334-335):

> ". . . It involves a jurisdictional dispute—an asserted overlapping of the interests of two crafts. It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority."

Going further, this Court stated (p. 336-337):

> "It seems to us plain that when Congress came to the question of these jurisdictional disputes, it

> chose not to leave their solution to the courts. As we have already pointed out, Congress . . . selected different machinery for their solution. Congress did not leave the problem of inter-union disputes untouched. It is clear from the legislative history of § 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. . . . However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board. If the present dispute falls within § 2, Ninth, the administrative remedy is exclusive. If a narrower view of § 2, Ninth is taken, it is difficult to believe that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others."

The second of the trilogy of cases, all of which were handed down on the same day, was *Switchmen's Union of North America* v. *National Mediation Board,* 320 U. S. 297 (1943), wherein SUNA and some of its members questioned the determination of craft lines by the National Mediation Board incident to a representation election. The result of the Mediation Board's determination was to include several small groups of yard employees represented by SUNA among a much larger group throughout the railroad. As a result, in the election that followed, the Brotherhood

of Railroad Trainmen was designated as the collective bargaining representative for the system-wide craft which included the previously independent smaller groups. SUNA filed suit asking the court to cancel the election held by the Mediation Board and to define the craft along the lines desired by it. The District Court took jurisdiction of the dispute and upheld the decision of the Mediation Board. This Court stated (p. 300): "We do not reach the merits of the controversy. For we are of the opinion that the District Court did not have the power to review the action of the National Mediation Board in issuing the certificate."

As a final *caveat* on the federal courts' jurisdiction in these matters of inter-union representation disputes, the Court dealt with its prior decisions holding that the federal courts had jurisdiction to prevent the carrier from interfering with the rights of employees to freely select their bargaining representative such as: *Texas & N.O. R. Co.* v. *Brotherhood of Ry. & S.S. Clerks,* 281 U. S. 548 (1930), and *Virginian Railway Co.* v. *System Federation No. 40,* 300 U. S. 515 (1937). The BLF&E (Pet., pp. 12-13), places primary reliance upon these two cases as supporting the District Court's jurisdiction in the present cases. However, in both of these cases, the carrier was accused of fostering a company union to the detriment of regularly organized independent national unions. The District Courts were held to have jurisdiction to insure compliance with the mandates of the Railway Labor Act prohibiting the carrier from interfering with the free selection of a

collective bargaining representative. However, in the *SUNA* case, this Court distinguished that type of controversy from those involving inter-union craft line disputes, recognizing that, in the absence of such a jurisdictional dispute, the federal courts would have jurisdiction to enforce the mandatory collective bargaining requirements of the Railway Labor Act.

This Court also again distinguished the *Clerk's* case and the *Virginian Ry. Co.* case from one involving a jurisdictional dispute in *General Committee* v. *MKT R. Co.*, 320 U. S. 323, 335. If the BLF&E had been certified by the Mediation Board as the representative of apprentice locomotive engineers on the L&N and, if the L&N had then negotiated with the BLE and refused to negotiate with the BLF&E then a situation analogous to that in the *Virginian Ry. Co.* case would be present.

The other cases relied upon by BLF&E: *Fibreboard Corp.* v. *NLRB*, 379 U. S. 203 (1964); *United Industrial Workers of Seafarers* v. *Bd. of Trustees of Galveston Wharves*, 351 F. 2d 183 (C.A. 5, 1965); *Brotherhood of Railroad Trainmen* v. *Central of Ga. Ry. Co.*, 305 F. 2d 605 (C.A. 5, 1962); *Order of Railroad Telegraphers* v. *Chicago & Northwestern Ry. Co.*, 362 U. S. 330 (1960); and *Rutland Railway* v. *Brotherhood of Locomotive Engineers*, 307 F. 2d 21 (C.A. 2, 1962), have no application to the issues before this Court since they do not even remotely involve an inter-union jurisdictional dispute as to the craft lines of two unions representing separate crafts on a single employer railroad, as does the instant litigation.

JURISDICTION OF THE NATIONAL MEDIATION BOARD UNDER § 2, NINTH OF THE RAILWAY LABOR ACT (45 U.S.C. § 152, NINTH).

Petitioners' reliance (Pet., pp. 19-20) on *dictum* appearing in *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 135 F. 2d 780, 782 (C.A. D.C., 1943), is misplaced. That *dictum* and the National Mediation Board's interpretation that it lacks authority to determine craft line disputes was discredited in *General Committee* v. *Missouri-Kansas-Texas, supra,* where, in footnote 11, this Court commented (320 U. S. page 336):

> "It is apparently the view of the National Mediation Board that § 2, Ninth was designed to cover only those disputes entailing an election by employees of their representatives. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 135 F. 2d 780, 782. In an election case the Board may have to make a preliminary determination as to the eligibility of voters involving the type of problem presented here. See *Brotherhood of Railroad Trainmen* v. *National Mediation Board,* 88 F. 2d 757, dealing with the question whether brakemen having seniority as conductors could vote in the conductors' election."

Then, in the body of the opinion to which the footnote is appended, this Court said (p. 336):

> ". . . However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. To the contrary, it fashioned an administrative remedy and left that group of disputes to the National Mediation Board."

We think it is clear that this Court has taken a broader view of the Mediation Board's jurisdiction under Section 2, Ninth, than does the Mediation Board itself. This is most apparent from Note 11 (p. 336):

> ". . . It is clear from the legislative history of § 2, Ninth that it was designed not only to help free the unions from the influence, coercion and control of the carriers but also to resolve a wide range of jurisdictional disputes between unions or between groups of employees. . . ."

Section 2, Ninth was added by the 1934 amendments to the statute (48 Stat. 1185). Those amendments were drafted by Joseph B. Eastman, then the Federal Co-ordinator of Transportation, and he made entirely clear that Section 2, Ninth would empower the NMB to decide jurisdictional disputes such as we have here. Thus, in the Hearings on H.R. 7650 before House Committee on Interstate and Foreign Commerce, 73d Cong., 2d Sess., at 45, the following colloquy occurred after Commissioner Eastman was asked whether the phrase "craft or class" as used in Section 2, Fourth was defined in the bill:

> "Commissioner Eastman: No. We thought of that, as to whether or not it was necessary to define craft or class, but those are words which have been used in labor parlance for a very long time, and I think there would be no difficulty in determining what is a craft or class of employees.
>
> "Mr. Wolverton: You do not think that without definition they might create disputes between

the different classes of employees as to the jurisdiction of each?

"Commissioner Eastman: No; and if there are any disputes I think that matter is sufficiently covered by the provisions of the ninth paragraph, which provides for the settlement of such disputes, or rather, provides the tribunal which shall have power to consider and determine such disputes."

This matter was raised again shortly thereafter (*Ibid.*, at 57), as follows:

"Mr. Huddleston: How would we resolve an issue where there was a conflict of jurisdiction as to classes and crafts, such, for illustration, as comes up in the classification of employees. We have had some pretty bitter disputes, we will say, between the carpenters and the sheet-metal workers over who should put in metal window frames. That is just an illustration of what sometimes happens, and the trouble has been that nobody could say whether the man doing that work was a carpenter or a sheet-metal worker. What would you do with a situation such as this under this bill?

"Commissioner Eastman: It is the intent that that would be handled under the paragraph ninth that I have discussed."

In any event, whether the jurisdictional dispute involved in the present case is one for resolution by the Mediation Board under § 2, Ninth, is not at all crucial to the correctness of the District Court's action in dismissing the complaints for lack of the Court's juris-

diction.[1] If it is not embraced within the ambit of Section 2, Ninth, then the dispute is a jurisdictional one within the exclusive primary jurisdiction of the National Railroad Adjustment Board under § 3, First (i) of the Railway Labor Act, and the District Court did not have jurisdiction to determine the merits of such a dispute (Appendix, p. 61, *infra.*).

JURISDICTION OF THE NATIONAL RAILROAD ADJUSTMENT BOARD UNDER § 3, FIRST (i) OF THE RAILWAY LABOR ACT (45 U.S.C. § 153, FIRST (i)).

If the BLF&E's claimed right to *exclusivity* in the representation of *all* individuals who may become locomotive engineers is not actually founded upon a claimed *statutory* right under the Railway Labor Act (which statutory right is for determination by the National Mediation Board under § 2, Ninth), then the BLF&E must necessarily predicate its alleged right to exclusivity upon some provision of an *agreement*. Thus, if it avoids a classification of this jurisdictional dispute as being one of a representational nature for resolution by the National Mediation Board, the BLF&E simply runs into another type of jurisdictional dispute which is within the exclusive jurisdiction of the National Railroad Adjustment Board. We strongly dispute the BLF&E's interpretations of Article 26, Sections 9 to

[1]Indeed, even the National Mediation Board recognizes that the courts do not have jurisdiction to settle inter-union controversies of this nature. In its brief (pp. 23, 43) filed in *National Mediation Board* v. *Brotherhood of Locomotive Engineers*, Appeal No. 22158, in the Court of Appeals for the District of Columbia, that Board recognized that the Court's denial of jurisdiction of BLF&E's complaints in the instant litigation was correct. The Board stated that "The result reached by the Sixth Circuit seems correct and wholly consistent with our position" (p. 43).

12, of the L&N-BLF&E collective bargaining agreement (R. No. 5402, Doc. 2, Ex. 1).

It is well settled that no court, state or federal, has jurisdiction to decide the merits of a dispute over the proper interpretation of a collective bargaining agreement between a railroad labor union and a railroad. *Slocum* v. *Delaware, L.&W. R. Co.,* 339 U. S. 239 (1950); *Order of Railway Conductors* v. *Southern Ry. Co.,* 339 U. S. 259 (1950); *Pennsylvania R. Co.* v. *Day,* 360 U. S. 548 (1959); *Brotherhood of Locomotive Engineers* v. *Louisville & N. R. Co.,* 373 U. S. 33 (1963); and *T.-C.E. Union* v. *Union Pacific R. Co.,* 385 U. S. 157 (1966).

Since the Court has no jurisdiction to decide the merits of a dispute involving the proper interpretation of the collective bargaining agreement, we will not present any detailed arguments concerning such a dispute. However, we do desire to make certain basic points in order to show this Court, as we did the courts below, that there is, in fact, a serious dispute concerning the meaning which BLF&E attributes to Article 26 of the agreement.

We make it clear, as we have always done to proper representatives of the BLF&E and as we did to the courts below, that the engineer training program commenced on the L&N in April, 1966, was not instituted for the purpose of preventing the promotion of any L&N firemen to engineers, if qualified. Nor has the training program, in fact, operated to prevent the promotion of any L&N firemen. The firemen's craft continues to be a source or a pool from which the carrier

obtains individuals who may become qualified to become locomotive engineers. However, the firemen's craft has never been and is not now the *exclusive* source for obtaining locomotive engineers on the L&N. In the past, it has been an important source from which the carrier obtained individuals for the carrier's officials to teach, instruct, examine and qualify as locomotive engineers (a part of such training and instruction has always been accomplished with the cooperation of the senior locomotive engineers). However, there is now and will continue to be an insufficient number of firemen from which the carrier can meet all its needs for locomotive engineers (R. 5829, Doc. 10, pp. 5-6, 9, 11).

The L&N entered into the agreement of April 28, 1966, with the BLE when it became apparent that it would not be able to fill all of its requirements for locomotive engineers by promoting locomotive firemen. A program of training engineers so that they may be available for employment as engineers has become a necessity. L&N did not violate any provision of the collective bargaining agreement between L&N and BLF&E when it entered into the agreement on April 28, 1966, with the BLE and commenced its program to train apprentice engineers. The L&N will also continue to respect the right of all its firemen to promotion, when qualified and as needed as engineers (*Ibid.*, pp. 5-7, 9, 10-12).

The collective bargaining agreement is not the *source* of the right of L&N's Management to do all things necessary to safely and efficiently operate the

railroad. That right emanates from its franchise and is inherent in its power to operate a railroad. Accordingly, one does not search for a provision in a collective agreement *authorizing* L&N to set up a training program to instruct individuals in regard to all things necessary to safely and efficiently operate its diesel locomotives. One looks only to determine whether, by agreement, L&N has been *prohibited* from inaugurating such a training program or whether it has contracted away some of its inherent power by agreeing with a labor organization concerning the substance of such a program.[1]

There is no provision in the collective bargaining agreement which prohibits L&N from establishing an apprentice locomotive engineer training program. Nor is there any provision in the collective bargaining agreement which requires *all* locomotive engineers to be taken *exclusively* from the ranks of firemen. In fact, Section 9(a) of Article 26 specifically provides that on seniority districts where firemen are required to fire three and less than four years, one fireman will be promoted to each engineer hired, and this quota is obviously applicable only where there are both categories of men available and desiring to fill a vacancy of locomotive engineer. If there are no firemen qualified for promotion, then certainly the L&N could obtain all its engineers from other sources. Conversely, if there

[1]The relationship of employer and employee is not dependent upon a collective bargaining agreement. "The common law rights inherent in such relationship still exists except to the extent that they may be modified by legislation or by the specific contract between the employer and the employee." *United States Steel Corp.* v. *Nichols*, 229 F. 2d 396, 399 (C.A. 6, 1956), cert. denied 351 U. S. 950 (1956).

are sufficient firemen qualified for promotion to engineer and no other person qualified as an engineer seeking to fill an engineer vacancy, then certainly the L&N could obtain all its engineers by promoting firemen. It is quite another thing, however, to argue, as does the BLF&E, that, *regardless of the availability of persons in any category,* all locomotive engineers must come *exclusively* from the ranks of firemen. Moreover, we strongly dispute the BLF&E's very limited interpretation of their term "hired engineer" as being limited exclusively to individuals who had become engineers by promotion from the ranks of firemen on some other railroad. The very rules relied upon by the BLF&E actually affirm the L&N's common law right to hire engineers, and the L&N does not agree that its right is limited to engineers who have been promoted from firemen to the position of engineers on other railroads. We strongly take issue with such an interpretation of the collective bargaining agreement relied upon by the BLF&E (R. 5829, Doc. 10, pp. 10-12).

There is a second aspect of the BLF&E's contention involving Article 26 that needs to be set straight. The BLF&E erroneously assumes that it has the right, to the complete exclusion of the BLE, to train all of L&N's prospective locomotive engineers and to determine their qualifications for becoming L&N engineers. We strongly take issue with any such interpretation of Article 26.

The training, instructions, standards, the nature of all examinations and other qualifications for a fireman to be promoted to a locomotive engineer involve mat-

ters of management prerogative and are not provided for in Article 26, or in any other collective bargaining agreement with any other labor organization on the L&N, except that Article 26 provides that a fireman shall be examined for promotion when he has completed and turned in to the proper company officer his first, second and third year mechanical examination papers, and provides that a fireman will not be promoted to engineer unless he has had at least three years' road experience.[1] The agreement accords no rights whatsoever to the BLF&E to determine the qualifications of a locomotive engineer. Management determines such qualifications and prepares and gives the examination for promotion from fireman to engineer.

The BLF&E is accorded no agreement right by Article 26 to formulate with the carrier the *substance* of any training program for an individual to become a locomotive engineer, to determine the nature of instructions given such an individual, to determine the contents of examinations to be given such an individual or to otherwise determine the standards and qualifications of a locomotive engineer. These are matters of managerial prerogative.

With regard to any BLF&E claim to exclusivity based on Article 26, it is significant that substantially identical provisions to those contained in Paragraphs 2 to 12, inclusive, of Article 26 of the L&N-BLF&E agreement appear also in Article 26 of the L&N-BLE agreement. These are known as "joint rules" (R. 5402,

[1]This latter provision restricting promotion from a fireman to engineer unless the fireman has three years' *road* experience has been waived on many occasions in the past.

Doc. 2, p. 3). Thus, it is difficult to conceive how those paragraphs in Article 26 of the L&N-BLF&E agreement could possibly be effective to confer *exclusive* authority upon the BLF&E. The simple answer is that there is *nothing* contained in Article 26 of *either* of the agreements which confers any *agreement* right upon either the BLE or the BLF&E to formulate with the carrier the *substance* of any training program for an individual to become a locomotive engineer, to determine the nature of instructions given such an individual, to determine the contents of examinations to be given such an individual or to otherwise determine the standards and qualifications of a locomotive engineer.

The right of the BLE to negotiate an apprentice engineer training program with the L&N is not predicated upon any provision in Article 26 of its agreement with the L&N. The BLE's right to negotiate an apprentice engineer training program with the L&N is based upon the fact that it has been certified by the National Mediation Board under the provisions of Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth) as the statutory representative for the entire craft or class of locomotive engineers on the L&N.

There is nothing in the agreement which accords to the BLF&E the right to determine the qualifications of a locomotive engineer, nor could there lawfully be since the BLF&E has no *statutory* right under the Railway Labor Act to negotiate with the L&N, nor the L&N with it, concerning the qualifications of a skilled

craft or class which the BLF&E is not authorized to represent on the L&N.

Insofar as the dispute over the proper interpretation of Article 26 is concerned, it is for determination by the National Railroad Adjustment Board under Section 3 of the Railway Labor Act (45 U.S.C. § 153). Such a dispute is equally jurisdictional since Article 26 also is a part of the L&N-BLE collective bargaining agreement and is commonly referred to as a "joint rule." Compare the procedure involved in *T.-C.E. Union* v. *Union Pacific R. Co.*, 385 U. S. 157 (1966). Insofar as any asserted *statutory* right of BLF&E to negotiate concerning the qualifications of locomotive engineers is concerned, the dispute is one for the National Mediation Board under Section 2, Ninth of the Railway Labor Act (45 U.S.C. § 152, Ninth).

The Decisions of the Courts Below Are Not in Conflict With Applicable Decisions of the Court of Appeals of Other Circuits.

Counsel erroneously argue (Petition, p. 14) that the decisions of the courts below in these cases conflict with the decision of the Fifth Circuit Court of Appeals in *United Industrial Workers* v. *Board of Trustees of Galveston Wharves,* 351 F. 2d 183 (1965).

BLF&E's contentions in this regard are that L&N unlawfully refused to negotiate with it concerning its Section 6 Notice "to negotiate a training program for firemen" (Petition, p. 14). Petitioners argue that the courts below should have temporarily enjoined L&N from progressing the apprentice locomotive engineer

training program pending exhaustion of the Railway Labor Act procedures for handling major disputes, that is, disputes involving proposals to change the existing agreements or to make new agreements.[1] Petitioners further erroneously argue that the courts below should have ordered L&N to negotiate with BLF&E concerning its Section 6 Notice.

The BLF&E Section 6 Notice of March 25, 1965, is in reality a proposal to negotiate an apprentice locomotive engineer training program agreement. It patently seeks to establish an apprenticeship training program for one to become an engineer. Euphemistic titles of "student locomotive helper," "locomotive helper trainee" and "locomotive helper (qualifying for promotion)" are used. Article C of the notice provides that these terms are synonymous with the term "fireman." Article E provides that such a trainee shall receive seniority as a locomotive engineer upon completion of the program. We submit that, stripped of its obscurantist titles, this Section 6 Notice pertains to an apprenticeship training program for locomotive engineers.

This Section 6 Notice, as well as similar BLF&E notices served on other railroads on November 15, 1965, was one of the subjects at issue in *Brotherhood of Locomotive Engineers* v. *National Mediation Board, et al.*, 284 F. Supp. 344 (D.C. D.C., 1968). Therein, the district court found that since the service of these

[1]The BLF&E did not seek to have the Court maintain the *status quo* pending any administrative determination of the jurisdictional dispute. BLF&E sought to have the Court determine the *merits* of such a dispute.

Section 6 Notices, a BLE-BLF&E jurisdictional dispute has existed (pp. 351-352), and that the National Mediation Board has exclusive jurisdiction to resolve it (p. 352). The court ordered the National Mediation Board to take jurisdiction and determine whether BLE or BLF&E should represent the employees involved. This decision is now pending on appeal in the Court of Appeals for the District of Columbia Circuit.[1]

It is the existence of an inter-union jurisdictional dispute which distinguishes the case at bar from the Fifth Circuit Court of Appeals decision in *United Industrial Workers* v. *Board of Trustees of Galveston Wharves, supra.* In the *Galveston Wharves* case there was no question concerning the union's right to represent the employees. Therein, after the union formally notified the employer of its proposal to change the collective bargaining agreement, the employer leased the entire facility to the Port Richmond Elevator Company. Thereafter, the union served a Section 6 Notice which called for the negotiation of an agreement covering "shut down, leasing or subcontracting." When negotiations failed to resolve the dispute, the union

[1]The final outcome of this case does not affect the validity of the judgments below. In the case at bar the essential findings are: (1) that there is a jurisdictional dispute between BLF&E and BLE concerning which organization is empowered to negotiate in behalf of apprentice engineers, and (2) that the federal courts do not have jurisdiction to resolve such a jurisdictional dispute.

On the other hand, the Washington lawsuit goes two steps further, holding: (3) that the National Mediation Board has power to decide the dispute, and (4) and that it should exercise that power and resolve the controversy. Whatever may be said about points 3 and 4, the law is and for many years has been crystal clear about points 1 and 2. Federal courts do not have jurisdiction to resolve disputes between a railroad labor union and a railroad growing out of an inter-union jurisdictional dispute.

went on strike and filed suit in the district court seeking an injunction against consummation of the lease pending exhaustion of the major dispute procedures of the Railway Labor Act.

The Fifth Circuit Court of Appeals held that, by leasing all of the facilities, the employer had unilaterally changed "working conditions." The district court's finding that it lacked jurisdiction was reversed, and the case was remanded for further proceedings, which, including several appeals, continue unabated at the time of this writing. Please see *United Industrial Workers* v. *Board of Trustees of Galveston Wharves,* 400 F. 2d 320 (C.A. 5, 1968).

BLF&E would compare the leasing of facilities by Galveston Wharves to L&N's execution of the apprentice locomotive engineer agreement with BLE. The differences are so obvious that we find it impossible to believe the contention is seriously made. BLF&E has available to itself either one or the other of two fully adequate administrative remedies. If it wishes to contest the statutory power of the BLE to negotiate concerning the subject matter of individuals training to become locomotive engineers, it may do so by filing a Section 2, Ninth protest before the National Mediation Board. On the other hand, if BLF&E seeks to assert only rights arising under Article 26 of the L&N-BLF&E agreement, it may do so by submitting this dispute to the National Railroad Adjustment Board.

Further, the decisions of the courts below are consistent with the decisions of other circuits dealing with craft-line determinations and inter-union jurisdic-

tional disputes. In *Division No. 14, Order of Railroad Telegraphers* v. *Leighty,* 298 F. 2d 17, 19 (C.A. 4, 1962), certiorari denied, 369 U. S. 885 (1962), an intra-union jurisdictional dispute involving integration of seniority rosters after a railroad merger was held to be within the exclusive jurisdiction of the National Mediation Board. In *Howard* v. *St. Louis-S. F. Ry. Co.,* 301 F. 2d 905, 908 (C.A. 8, 1966), a complaint alleging hostile racial discrimination founded in an allegedly arbitrary classification of Negro trainmen as "train porters" and requesting the court to reclassify such employees as "brakemen" was held not justiciable since it requested a re-determination of class or craft lines, the court holding that such a dispute is one for the National Mediation Board. In *Southern Pacific Co.* v. *Switchmen's Union of North America,* 356 F. 2d 332 (C.A. 9, 1966), it was held that a dispute as to which of two unions was entitled to represent certain yard trainmen involved a determination of craft lines and was within the jurisdiction of the National Mediation Board. In addition, the carrier was relieved of negotiating with one of the unions concerning its Section 6 Notice which proposed an agreement defining the craft lines along the basis of its own proposals. The court held that such a notice was invalid as seeking to obtain from the carrier a class determination which could only be awarded by the National Mediation Board.

Moreover, L&N's actions in this matter have followed the practices of others which have met with court approval. Had L&N's need for engineers not

been so acute by 1966, it might have been able to defer entering into any agreement with either of the unions pending a resolution of this jurisdictional dispute. But L&N could not wait, and the BLE threatened to strike if L&N negotiated with BLF&E concerning apprentice engineers. L&N believed and still believes that BLE is the appropriate collective bargaining representative on the L&N to make agreements on behalf of apprentice locomotive engineers.[1] Under these circumstances, L&N was not required to await a resolution of the dispute before making the 1966 agreement. In *Ruby* v. *American Air Lines, Inc.*, 323 F. 2d 248 (C.A. 2, 1963), cert. den. 376 U. S. 913 (1964), a dispute developed between the international headquarters of the pilots' union and the local organization on American Air Lines during the negotiations of the crew complement dispute. Unwilling to accept the dictates of the international headquarters, American's pilots formed their own union, Allied Pilots Association, and obtained authorization cards from an overwhelming majority of American's pilots. Faced with a strike threat from Allied, the carrier negotiated an agreement with it.

In affirming the district court's dismissal of a lawsuit filed by the international union, the Second Circuit Court of Appeals stated (p. 254):

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[1]The BLE had been certified by the National Mediation Board as the representative for locomotive engineers employed by the L&N. Traditionally, throughout all industry, including the railroad industry, apprentices, whose only work consists of learning the trade of the skilled craft, have been represented by the bargaining representative of that skilled craft (R. 5402, Doc. 16, p. 4; R. 5829, Doc. 10, p. 7).

> ". . . American recognized Allied only when possessed of substantial evidence that Allied represented an overwhelming proportion of its pilots and when threatened with a strike if it refused recognition. Under such circumstances recognition by an employer who has not been guilty of a relevant unfair labor practice need not await certification, although he acts at peril of being right . . .".

The court also held, consistently with the decisions handed down in other circuits, that the dispute between the international and the separately organized local union was a jurisdictional dispute within the jurisdiction of the National Mediation Board.

The determinative distinction between these decisions and *Galveston Wharves* is that they all involve questions relating to the determination of craft lines of a collective bargaining unit. In each instance the courts held they lacked jurisdiction to resolve such issues. Regardless of the merits of the decision in *Galveston Wharves,* it is clear that the court in handing down its decision did not consider itself as stating law different from that decided in the other federal circuits. Had the case dealt with a union jurisdictional dispute, the court would certainly have discussed the area of responsibility carved out for the National Mediation Board. Under the facts there presented, that problem was not in issue and this distinguishing factor makes the case inapplicable to the instant controversy.

We submit that there is no conflict in authority among the decisions handed down in the various federal

circuits and the BLF&E's fancied contention that one exists, does not serve as a basis upon which this Court should grant a writ of certiorari to the Sixth Circuit Court of Appeals and take jurisdiction of the instant case.

CONCLUSION.

The decision below is correct and follows prior decisions of this Court. No unsettled question of importance is presented, and there is no conflict of decisions. Accordingly, a writ of certiorari should not issue.

Respectfully submitted,

JOHN P. SANDIDGE,
WOODWARD, HOBSON & FULTON,
1805 Kentucky Home Life Building,
Louisville, Kentucky 40202,

PHILIP M. LANIER,
JOSEPH L. LENIHAN,
MARVIN D. JONES,
EUGENE W. HERDE,
DAVID M. YEARWOOD,
908 West Broadway,
Louisville, Kentucky 40201,

Attorneys for Respondent, Louisville and Nashville Railroad Company.

APPENDIX

APPENDIX

Statutes Involved.

In addition to the sections of the Railway Labor Act printed in petitioners' appendix (A. 38-41), the following section of that Act is relied upon, alternatively, by this respondent:

Section 3 First (i) of the Railway Labor Act (45 U.S.C. § 153 First (i)) which provides:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

CERTIFICATE OF SERVICE.

This certifies that the undersigned counsel for the Louisville and Nashville Railroad Company on the 10th day of January, 1969, served copies of this Brief and Appendix to Brief on all parties by mailing copies in duly addressed envelopes with first-class postage prepaid, to their attorneys of record as follows:

Harold C. Heiss,
Russell Day,
622 Keith Building,
Cleveland, Ohio 44115,

Robert E. Hogan,
1906 Kentucky Home Life Building,
Louisville, Kentucky 40202,

Alex Elson,
Willard J. Lassers,
11 South La Salle Street,
Chicago, Illinois 60603,

Herbert L. Segal,
1010 Republic Building,
Louisville, Kentucky 40202,

Attorneys for BLF&E.

Harold A. Ross,
Ross & Kraushaar,
730 Standard Building,
Cleveland, Ohio 44113,

Charles I. Dawson,
Richard W. Iler,
Bullitt, Dawson & Tarrant,
1700 Kentucky Home Life Building,
Louisville, Kentucky 40202,

Attorneys for BLE

Marvin D. Jones

MARVIN D. JONES

In the Supreme Court of the United States

Supreme Court, U.S.
FILED
DEC 24 1968
JOHN F. DAVIS, CLERK

OCTOBER TERM, 1968.

No. 774.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioner,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

B. A. TURNER, *et al.*, and BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

Petitioners,

vs.

LOUISVILLE AND NASHVILLE RAILROAD COMPANY and BROTHERHOOD OF LOCOMOTIVE ENGINEERS,

Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

HAROLD A. ROSS,
ROSS & KRAUSHAAR,
730 Standard Building,
Cleveland, Ohio 44113,

CHAS. I. DAWSON,
RICHARD W. ILER,
BULLITT, DAWSON & TARRANT
1700 Kentucky Home Life Building
Louisville, Kentucky 40202

Counsel for Respondent
Brotherhood of Locomotive Engineers.

THE GATES LEGAL PUBLISHING CO., CLEVELAND, OHIO—TEL. (216) 621-6647

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

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BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN,

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Respondents.

BRIEF IN OPPOSITION FOR RESPONDENT BROTHERHOOD OF LOCOMOTIVE ENGINEERS.

QUESTION PRESENTED.

The Brotherhood of Locomotive Firemen and Enginemen ("Firemen's Union") is the bargaining representative for the craft of locomotive firemen on the Louisville and Nashville Railroad Company ("L&N"), and the Brotherhood of Locomotive Engineers ("Engineers' Union") is the certified representative for the craft of locomotive engineers on L&N.

The Engineers' Union executed an agreement with L&N covering apprentice locomotive engineers as a part of the craft represented by that labor organization. The Firemen's Union sought to enjoin the effectuation of that agreement claiming that (1) the Firemen's Union had sole representational authority to bargain for apprentices to the engineers' craft and that (2) the Engineers' agreement conflicted with the Firemen's collective agreement and established practices. The district court dismissed on the basis that it lacked jurisdiction to decide the jurisdictional dispute between the two unions.

Eighteen months later, the Firemen's Union again sought to restrain the continuation of the apprentice locomotive engineer training program and the employment of engineers by L&N from sources other than engineers from other railroads or L&N firemen. The Firemen's Union also alleged that the L&N and the Engineers' Union were undermining the Firemen's representational and bargaining authority for the craft of firemen by reason of the apprentice engineer program. Once again, the district court dismissed for lack of jurisdiction to determine the proper employee representation in these crafts.

The cases were consolidated on appeal. Finding the controversy was a jurisdictional dispute between two unions which the courts had no power to resolve, the court of appeals affirmed.

The question presented is whether, in a suit by the craft representative of firemen to enjoin the effectuation and implementation of an apprentice engineer agreement negotiated by the craft representative for engineers, the federal courts have the power to decide the jurisdictional dispute between the two unions as to their overlapping interests in determining the proper representative for apprentice engineers. Ancillary thereto is the question

whether jurisdiction is conferred on the courts to decide the merits of the jurisdictional dispute when it is claimed that the Engineers' apprentice agreement conflicts with the collective agreement of the Firemen's Union and gives unlawful assistance to the Engineers' Union in that some engineers will not come from the ranks of the firemen.

STATEMENT.

Background of the Events Leading to This Controversy.

In large measure, an understanding of this case depends upon a description of the underlying situation between the true adversaries herein, the Engineers' Union and the Firemen's Union. To a limited extent, it is necessary to examine the technological advances and functional changes in the railroad industry which gave momentum to the long standing jurisdictional conflict between these two unions.

For many years, the Engineers' Union has been the recognized collective bargaining representative for the craft of locomotive engineers on the L&N and, on December 31, 1957, was certified as the bargaining representative of this craft by the National Mediation Board ("NMB") in a representational dispute between the two Brotherhoods (No. 17,588, A.35c).[1] The Firemen's Union has been and is the bargaining representative for the craft of locomotive firemen on the L&N (No. 17,588, A.6a). And throughout many years, the Engineers and the Firemen, as bargaining representatives for the respective crafts, have been involved in a series of disputes concern-

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[1] As in the petition, references are to the appendices in the Court of Appeals for the Sixth Circuit (Case Nos. 17,588 and 18,479). References to the appendices of the Firemen's Union carry the suffix "a"; to the appendices of the L&N, "b"; and to the appendices of the Engineers' Union, "c."

ing the scope of their jurisdictional authority and the power to govern matters related to the craft of locomotive engineers.[2]

The dispute specifically involved herein, which the Engineers' Union submits is jurisdictional,[3] may be considered to have originated as a result of certain section 6 Notices served on November 2, 1959 by the nation's rail carriers upon the so-called operating brotherhoods, including the two unions in this case. One of the issues raised therein concerned the retention or removal of firemen on all diesel-electric locomotives used in freight and yard service. See *Brotherhood of Locomotive Engineers v. Baltimore & Ohio R. Co.*, 372 U. S. 284 (1963). However, the underlying cause of this dispute may be at-

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[2] See *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943); *General Committee v. Southern Pac. Co.*, 320 U.S. 338 (1943).

[3] In *Carey v. Westinghouse Corp.*, 375 U.S. 261, 263 (1964), this Court defined the term "jurisdictional dispute" in the following manner:

> "We have here a so-called 'jurisdictional' dispute involving two unions and the employer. But the term 'jurisdictional' is not a word of a single meaning. In the setting of the present case this 'jurisdictional' dispute could be one of two different, though related, species: either—(1) a controversy as to whether certain work should be performed by workers in one bargaining unit or those in another; or (2) a controversy as to which union should represent the employees doing a particular work."

See also *Transportation-Communication Employees Union v. Union Pacific Co.*, 385 U. S. 157, 161 (1966).

Applying this distinction and the similar differentiation made by the amicus brief of the Solicitor General in the *Carey* case, the Engineers' Union submits that this jurisdictional dispute involves craft composition; for the question here is not which of the two labor organizations will do certain work, such as electrical inspection, but rather which of the two unions will represent certain employees—apprentice locomotive engineers. However, petitioners have incorrectly assumed that jurisdictional disputes are limited to work-assignment controversies (Pet., p. 19, n. 1).

tributed to the technological advances occurring through the dieselization of motive power on the railroads. According to the Presidential Railroad Commission, dieselization has led to the almost complete elimination of "the principal work which firemen had customarily done when they worked on steam locomotives." [4]

The question of the retention or removal of locomotive firemen on road freight and yard diesel-electric locomotives was subsequently the subject of further study by Emergency Board No. 154, appointed by the President on April 3, 1963, pursuant to the provisions of Section 10 of the Railway Labor Act, 45 U. S. C. 160, and of compulsory arbitration by Arbitration Board No. 282, established by joint resolution of Congress on August 23, 1963, Public Law 88-108, 77 Stat. 132. Each of these Boards found, as did the Presidential Railroad Commission, that the lookout, mechanical, and relief functions, and also the feature whereby many engineers had come from the ranks of firemen, were not significant to require the retention of locomotive firemen on all diesel-electric locomotives in road freight and yard service.

On November 26, 1963, Arbitration Board No. 282 issued its award, 41 Lab. Arb. 673. In essence, the award authorized the elimination of ninety percent of the existing firemen positions on freight and yard engine crews on the nation's railroads (No. 17,588, A. 31a-32a).

As a result of the award of Arbitration Board No. 282, eighteen thousand firemen were severed from employment during 1963 to 1966. *Brotherhood of Railroad*

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[4] Report of the Presidential Railroad Commission, Washington, D. C., February 1962, p. 36. The Commission was created on November 1, 1960, by Executive Order 10891 to study the questions presented by the aforementioned section 6 Notices of November 2, 1959 and to publish a report of its findings and recommendations.

Trainmen v. Akron & Barberton Belt R. Co., 385 F. 2d 581, at 610, n. 1 (D.C. Cir. 1967). Naturally, this declination in the numbers of locomotive firemen would be "a staggering blow to the BLF&E," *id.* at 591, for there would be a similar relationship to the membership figures of the Firemen's Union as the union principally representing firemen.

Thus, in an effort to stop the continuing decline in its membership, on March 25, 1965, as to the L&N, and on November 15, 1965, as to most other of the nation's railroads, the Firemen's Union served purported section 6 Notices relating to apprentice locomotive engineers, which is the subject matter of this proceeding (No. 17,588, A. 7c, 14c).[5]

The Engineers' Union had been informally negotiating with the carriers regarding training programs for apprentice locomotive engineers prior to the November 15th notices (No. 17,538, A. 27c). Taking umbrage at the

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[5] Petitioners say the notices related to the establishment of a formal training program for firemen (Pet., p. 4). This is a transparent obfuscation of the facts. There has not been nor is there any training necessary to be a fireman. Further, the notice of November 15, 1965, is subtitled as "training for railroad locomotive enginemen apprentices," which are defined as persons "engaged in learning the craft of locomotive enginemen." There is no craft of enginemen, only engineers and firemen, 45 U.S.C. 153, First (h), and the substance of the proposal leaves no doubt as to its purpose—to create apprentices in the engineers' craft. For example, in regard to seniority, the Firemen's notice states, "Apprentices who have completed this training shall receive a seniority date as locomotive engineer." Any remaining doubt as to the purpose of this training program is dispelled by the appendix thereto which states, "When the apprentice has successfully completed the term of apprenticeship and has passed the final examination, he then will be qualified as a railroad locomotive engineer and will receive a seniority date as locomotive engineer in keeping with the appropriate provisions of the current agreement," *National Mediation Board v. Brotherhood of Locomotive Engineers, infra*, pp. 21-22. The Firemen's proposal on L&N, though using somewhat different language, has the same effect (No. 17,588, A. 8c, 14c).

proposals of the Firemen's Union, the Engineers' Union immediately informed all concerned carriers that "the instant request of the BLF&E infringes upon the statutory rights of the duly designated representative of the craft of locomotive engineers and the employees within that craft," and therefore, asserted, "its [Firemen's] demand on a national basis is in violation of the Railway Labor Act" (bracket supplied). The carriers and the NMB were also informed that the Engineers' Union would enforce its statutory rights as bargaining representative for the craft of locomotive engineers to represent and bargain for apprentice locomotive engineers through appropriate legal measures, which were subsequently elaborated upon to include the right to strike (No. 17,588, A. 25c-27c).

The Situation Before the National Mediation Board and the Suit Involving It.

On June 6, 1966, the nation's rail carriers, including the L&N, applied for the NMB's services under Section 5, First of the Act in connection with the Firemen's section 6 Notices (No. 17,588, A. 24c-25c). The carriers' request was based upon a jurisdictional or representational issue "as to which of the two disputing organizations may legally bargain for and on behalf of apprentice locomotive engineers," citing in support of the dispute the Firemen's notices of November 15, 1965 and the Engineers' letter of November 17, 1965 (No. 17,588, A. 24c). There followed an exchange of views between the NMB, the carriers, and the two organizations (No. 17,588, A. 15c-23c).

On June 21, 1966, the NMB denied the carriers' request for its services (No. 17,588, A. 15c-18c). In support of its denial, the NMB said: "[T]he question as posed involved a question of representation. Such issues are

resolved under Section 2, Ninth, of the Railway Labor Act." (No. 17,588, A. 18c).

Upon receipt of a copy of the NMB's letter the Engineers' Union duly noted the sentence, "such issues are resolved under Section 2, Ninth of the Railway Labor Act" and, accordingly, on June 30, 1966, sought to invoke the Board's services pursuant to Section 2, Ninth, to determine which organization, the Engineers or the Firemen, represents apprentice locomotive engineers on the L&N (No. 17,588, A. 34c-35c). The parties filed lengthy position letters with the NMB. One of those letters is worthy of comment. On July 13, 1966, the President of the Firemen's Union filed with the Board that organization's reply to the request of the Engineers' Union (No. 17,588, A. 44c-46c). In that document, the Firemen's Union clearly indicates that a representational dispute does exist between the two unions in regard to which organization does, in fact, represent apprentice locomotive engineers on the L&N and the various carriers throughout the country (No. 17,588, A. 45c).

On July 22, 1966, the NMB issued its directions in the two cases before it which are relevant to the instant proceeding (No. 17,588, A. 46a-49a; 50c-51c). First, in regard to the carriers' application and request for a hearing thereon, the Board reiterated its contention that the question as to which organization could properly and lawfully represent and bargain for apprentice locomotive engineers "involved a question of representation under Section 2, Ninth of the Railway Labor Act," 45 U. S. C. 152, Ninth (No. 17,588, A. 50c). The request for a hearing by the applicant carriers was, therefore, denied. With respect to the request of the Engineers' Union for adjudication of the opposing claims of the two organizations re-

garding apprentice locomotive engineers on the L&N, the NMB said that the statements failed to reveal a position that a representation dispute under Section 2, Ninth of the Act existed (No. 17,588, A. 48a). However, this statement conflicts with the comment of the Board contained in both its letter of June 21, 1966, and its letter of July 22, 1966, as to the carriers' application for services under Section 5, First of the Act. In conclusion, the NMB stated without description that "procedures other than those outlined in Section 2, Ninth of the Railway Labor Act are available to settle such disputes" (No. 17,588, A. 48a). On this basis, the Board concluded that a representation dispute under Section 2, Ninth did not exist over which it had jurisdiction; therefore, the application of the Engineers' Union should be dismissed (No. 17,588, A. 49a).

Since the Firemen's Union invoked the services of the National Mediation Board for purposes of mediation relative to its purported section 6 Notices, the NMB set August 4, 1966, as the date for mediation conferences between the Firemen's Union and the L&N respecting the apprentice locomotive engineer notices. On August 4, 1966, the Engineers' Union filed a complaint with the United States District Court for the District of Columbia seeking declaratory and injunctive relief against the NMB, the Firemen's Union, and six railroads, including the L&N. *Brotherhood of Locomotive Engineers v. National Mediation Board*, 284 F. Supp. 344 (D.D.C. 1968), *appeal pending* (Case Nos. 22,050 and 22,185). In part, the Engineers' Union requested the court to issue a mandatory injunction directing the NMB to fulfill its statutory duty under Section 2, Ninth of the Railway Labor Act to decide whether apprentice locomotive engineers are encompassed within the craft of locomotive engineers or within the craft of

locomotive firemen. As a result of this suit, mediation conferences were recessed pending a determination in that action.

Upon cross-motions for summary judgment in that case, that district court found that the federal courts have the power to determine whether the NMB has performed its statutory duty under Section 2, Ninth of the Act and that the Board had failed to perform that duty. Accordingly, the district court ordered the NMB to perform its statutory duty under Section 2, Ninth, to investigate and certify which of the two crafts—engineers or firemen—if either, encompass apprentice locomotive engineers.

The Cases Now Before This Court.

On April 28, 1966, the L&N and the Engineers' Union entered into an agreement respecting apprentice locomotive engineers on the L&N (No. 17,588, A. 5b). On June 27, 1966, the Firemen's Union sought to enjoin the effectuation of that agreement between the L&N and the Engineers by filing for injunctive relief in the United States District Court for the Western District of Kentucky (No. 17,588, A. 1a; 5a-11a). The temporary restraining order issued June 28, 1966 (No. 17,588, A. 1a) was dissolved on July 5, 1966 (No. 17,588, A. 2a), and the motion for temporary injunction was overruled by the following language:

> "As a matter of law this action involves a controversy between BLF&E and BLE, each of which is a labor organization within the meaning of the Railway Labor Act, as to which of those organizations is the exclusive bargaining representative for and in behalf of the apprentice locomotive engineers employed by the L&N and this court has no jurisdiction to determine that controversy, the determination of which is exclu-

sively within the jurisdiction of the National Mediation Board. *Brotherhood of Ry. & S. S. Clerks v. United Air Lines,* 325 F. 2d 56 (C.A. 6th, 1963)." (No. 17,588, A. 42a).

After the NMB had dismissed the Engineer's application for its services under Section 2, Ninth, the Firemen's Union filed a motion for rehearing and new trial. This motion was overruled on September 29, 1966, on the basis that, regardless of any action—or inaction—of the NMB, the federal courts do not have jurisdiction to determine the merits of the dispute (No. 17,588, A. 45a).

Approximately fifteen months later, the Firemen's Union filed its second complaint concerning the effectuation and implementation of the Engineers' apprentice engineer agreement of April 28, 1965. The allegations therein and the relief sought were quite similar to those contained in the first complaint. However, the second complaint contained embellished allegations that the Engineers' Union and the L&N were, through the apprentice engineer program, interfering with the representational rights of the Firemen's Union. In addition, it was alleged that the carrier's hiring of apprentice locomotive engineers rather than firemen was advantageous to the Engineers' Union as far as membership. On the other hand, it was further alleged that the hiring practice was disadvantageous to the Firemen's Union, since those employees had not gone through the ranks of firemen and were not as likely to join the Firemen's Union.

Once again, the district court, looking through form to substance, found that the suit in fact involved a jurisdictional dispute. Once again, the district court found that regardless of what action may have been taken by the NMB, the court did not have any power to adjudicate the jurisdictional dispute involved between the two unions.

And once again, the district court dismissed for lack of jurisdiction.

The cases were consolidated on appeal. The Court of Appeals for the Sixth Circuit affirmed the dismissal of the complaints in both actions, stating that the controversy presented a "jurisdictional" dispute involving an asserted overlapping of the interest of the two crafts which necessitated a determination of the point where the authority of one craft ends and the other begins. *Brotherhood of Locomotive Firemen and Enginemen v. Louisville and Nashville R. Co.*, 400 F. 2d 572, 575 (1968).

From certain incorrect assumptions offered in petitioners' statement of the case, the Firemen's Union contends that the Engineers' agreement for apprentices infringes upon its representational and bargaining authority for the firemen's craft and violates its collective agreements for firemen, thereby leading to interference and coercion within the meaning of the Act[6] (Pet., p. 4). Respondent, therefore, believes that clarification of those purported facts is required.

First, the Firemen's Union assumes that there is a shortage of firemen which Arbitration Board No. 282 and other Boards have found are not needed (Pet., p. 5). In fact, it is the problem of the lack of engineers which must be met. As the number of locomotive firemen employed, and thus the number of locomotive firemen qualified for

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[6] Much of the statement of the Firemen's Union goes to the merits of its position as to why it considers that it, rather than the Engineers' Union, should represent apprentice engineers. On the other hand, the Engineers' Union has contended throughout that it, as bargaining representative for the craft of locomotive engineers, has the exclusive right to bargain on the matters of hiring, qualifications, training and seniority of locomotive engineers and therefore for apprentice locomotive engineers, whom it considers to be a part of the journeyman craft represented by it (No. 17,588, A.38a; 25c-27c; 34c; 36c-37c).

promotion to locomotive engineers, has been reduced following the effectuation of the award of Arbitration Board No. 282, L&N found it necessary to provide an additional source for obtaining locomotive engineers. While the Firemen's Union implies that the L&N paid heavy bonuses to induce older engineers to retire in order to accelerate apprentice hiring (Pet., pp. 8-9), the separations to which it refers occurred in the summer of 1964, shortly after the effective date of Award 282 and in pursuance thereof (No. 18,479, A. 15b).[7] In addition, in further attempting to limit the number of employees who may have been available as engineers, the Firemen's Union in 1965 sought and obtained an order directing L&N not to conduct classes or examine firemen for promotion to engineers who had not had three years road experience. *Brotherhood of Locomotive Firemen and Enginemen v. Louisville and Nashville R. Co.*, Civil Action No. 5134 (W. D. Ky. 1965) (No. 18,479, A. 23b-30b; 51a-52a).

In other words, the facts show that the number of engineers required to run the nation's trains must be obtained from sources additional to locomotive firemen. Accordingly, the Engineers' Union exercised the prerogative available to it, as the sole and exclusive bargaining representative of that craft, to represent the apprentices to that craft and further, in that capacity, to establish their seniority in the craft of locomotive engineers, a sub-

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[7] Apparently, the L&N encouraged the retirement of a number of its older firemen and engineers who had already reached the retirement age of 65 or closely approaching it by individually offering a separation payment to them. This plan was accepted on an individual basis by a number of the carrier's older employees. These separation payments were accorded without regard to any union affiliation (No. 18,479, A.16b). The payments appear to be in accord with Award 282; and to the best knowledge of this respondent, the Firemen's Union never objected to these practices by the L&N or other carriers until the second complaint was filed herein.

ject within its jurisdiction. Conversely, the Firemen's Union, in its transparent attempt to preserve its existence and organization, laid claim to this same area on the basis that it, as the bargaining representative of the craft of firemen, can determine working conditions and seniority of locomotive engineers.

Whether or not Section 2, Eleventh (c) of the Railway Labor Act permits engineers and firemen to be members of either the Engineers' Union or the Firemen's Union is not relevant to this proceeding as contended at page 4 of the petition. There are no union shop agreements for these crafts on the L&N. Thus, an engineer coming from the ranks of the apprentice locomotive engineer training program may belong to either union. Some have joined the Firemen's Union while others have elected not to be a member of either union (No. 18,479, A. 7a; 6b; 9b).

The chief complaint of the Firemen's Union—upon which it bases its ultimate conclusions as to interference and coercion—would appear to be that the apprentice qualified engineer upon performing service as an engineer acquires fireman's seniority as of the same date that he acquired seniority as an engineer. The only reason that these engineers obtain a seniority date on the fireman's seniority roster is due to Article 26 of the Firemen's agreement with L&N (No. 18,479, A. 9a; 13b). Whether or not these engineers are entitled to dual seniority as firemen is a question of interpretation and application of the various provisions of the collective bargaining agreement between the Firemen's Union and L&N, and that agreement between the Engineers' Union and the L&N. For example, a question has arisen regarding the meaning of "hired engineers." That question, which was specifically raised in the first complaint, is within the jurisdiction of the National Railroad Adjustment Board (No. 18,479,

A. 10b-11b).[8] While the Firemen's Union stresses its interpretation of these agreements in the petition before this court, it has refused to submit that dispute to the Adjustment Board (No. 18,479, A. 11b).

Thus, the fact that the apprentice qualified engineer acquires a concurrent seniority date as a fireman is due to the provisions of the Firemen's agreement. Accordingly, the complaint of the Firemen's Union is not the result of outside forces but of its own choosing, particularly since it, as craft representative of the firemen, could serve a proper notice on L&N seeking to change or modify that provision in its agreement.

After the threshold question of jurisdictional or representational authority as to apprentice locomotive engineers, *i.e.*, which organization properly represents and can bargain for these apprentices, is resolved, each and every purported fact contained in the petition provides its own answer. For instance, if the certification of the Engineers' Union for the craft of engineers includes the apprentices in that craft, it would naturally follow that the apprentice program is sponsored by it. It also follows that the instructors for the apprentices would come from the journeyman craft of engineers, admittedly most of whom are members of the Engineers' Union. It would be ludicrous to use firemen to train engineers. However, in fact, some engineers who are local chairmen of the Firemen's Union have been used as instructors (No. 18,479, A. 14a; 17b).

Taken as a whole, the facts succinctly indicate that the underlying dispute is jurisdictional in nature—a clear dispute, colored by the effects of Award 282, as to the representational limits of the craft of firemen as compared

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[8] See on this point, *infra*, pp. 19-20, and n. 9 discussion.

with the craft of engineers. Thus the issue before this Court is whether the court of appeals erred in concluding that the instant controversy is a jurisdictional dispute over which the federal courts do not have jurisdiction to make the determinations apparently requested.

REASONS FOR DENYING THE WRIT.

This case does not present any important or novel question of law but only involves the well settled principle that the federal courts do not have jurisdiction to determine the merits of a "jurisdictional" dispute between two unions. The court of appeals held that the district court was correct in finding that it did not have the power to decide which craft, engineers or firemen, encompassed apprentice locomotive engineers and, therefore, could not determine which union had representational authority for those apprentices. In so holding, the court of appeals intimated that the instant dispute is "within the exclusive jurisdiction of the National Mediation Board." Whether the court of appeals was right in that statement—and this respondent submits it was—is not a proposition that needs to be reviewed at this time by this Court but should await consideration, if at all, in the proper case specifically presenting that question.

Contrary to petitioners' assertions, the decision below is not in conflict with any holding of this Court or any decision of the courts of appeals, and raises no question under the Railway Labor Act which merits this Court's review.

1. The decision below correctly follows the prior rulings of this Court. Having assumed that the designation of the Firemen's Union as bargaining representative for the craft of firemen on the L&N encompasses apprentice locomotive engineers (Pet., p. 12), petitioners rely

upon this Court's rulings that the federal courts may enforce the mandatory provisions of Section 2, Third and Fourth of the Act by granting appropriate injunctive relief, *Texas & No. Ry. Co. v. Brotherhood of Ry. & S. S. Clerks,* 281 U. S. 548 (1930); and *Virginian Ry. Co. v. System Federation,* 300 U. S. 515 (1937).

As a matter of fact, the Engineers' Union has consistently founded its position upon the complete teaching of the *Virginian Railway* case. If, as the Engineers' Union asserts, it is the certified bargaining representative of locomotive engineers on the L&N, then L&N has the statutory duty to bargain only with the Engineers respecting apprentice engineers and the negative duty to bargain with no other organization on that subject or the matters of hiring and seniority of engineers. Having a duty to bargain only with the Engineers, L&N would violate Section 2, Ninth of the Railway Labor Act if it were to negotiate or bargain with the Firemen in those respects.

Thus, the following language of the court in the *Virginian Railway* case is applicable hereto:

> "Both the statute and the decree are aimed at securing settlement of labor disputes by inducing collective bargaining with the true representative of the employees and by preventing such bargaining with any who do not represent them. The obligation imposed on the employer by § 2, Ninth, to treat with the true representative of the employees as designated by the Mediation Board, when read in the light of the declared purposes of the Act, and of the provisions of § 2, Third and Fourth, giving to the employees the right to organize and bargain collectively through the representative of their own selection, is exclusive. *It imposes the affirmative duty to treat only with the true representative, and hence the negative duty to treat with no other.*" (Emphasis supplied.) *Id.* at 548.

While both unions concede that the present controversy grows out of an application of the principles of majority representation and collective bargaining and, in fact, employ the axioms underlying that admission, the instant cases necessarily involve a jurisdictional dispute—an asserted overlapping of the interests of the two unions. *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943). There, in differentiating the holdings in the *Clerks* case and the *Virginian Railway* case from the principles applicable to jurisdictional disputes, the Court said:

> "It necessitates a determination of the point where the authority of one craft ends and the other begins or of the zones where they have joint authority. In the Clerks case and in the Virginian Ry. Co. case the Court was asked to enforce statutory commands which were explicit and unequivocal. But the situation here is different. Congress did not attempt to make any codification of rules governing these jurisdictional controversies. It did not undertake a statement of the various principles of agency which were to govern the solution of disputes arising from an overlapping of the interests of two or more crafts. It established the general principles of collective bargaining and applied a command or prohibition enforcible by judicial decree to only some of its phases." *Id.* at 335.

Further, there can be no question that jurisdictional disputes, whether involving representation rights or determination of the respective work to be performed by two or more competing or overlapping crafts, are not to be litigated in the courts. In *General Committee v. Missouri-K.-T. R. Co., supra,* this Court said:

> "However wide may be the range of jurisdictional disputes embraced within § 2, Ninth, Congress did not select the courts to resolve them. * * * If a narrower view of § 2, Ninth, is taken it is difficult to believe

that Congress saved some jurisdictional disputes for the Mediation Board and sent the parties into the federal courts to resolve the others." *Id.* at 336.

Alluding to *M-K-T*, the Court said in *General Committee v. Southern Pacific Co.*, 320 U.S. 338, 343-4 (1943):

"(W)e believed that Congress left the so-called jurisdictional controversies between unions to agencies or tribunals other than the courts."

Although the Firemen's Union apparently claims that there are some jurisdictional disputes that do not fall within the ambit of the administrative agencies created under the Act and are, therefore, within the jurisdiction of the courts, this Court has clearly determined that all jurisdictional disputes are nonjusticiable. For example, in *Order of Railway Conductors v. Pitney*, 326 U. S. 561 (1946), this Court held that the judiciary did not have jurisdiction to restrain a carrier from allegedly violating its collective bargaining agreement with the conductors' union by removing some of its members from certain jobs and replacing them with employees from another craft represented by the trainmen's union. The question of whether the conductors' contract was violated in that jurisdictional dispute was referred to the National Railroad Adjustment Board.[9] See also *Slocum v. Delaware, L. & W. R. Co.*, 339

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[9] The district court herein appropriately found that "the complaint was also predicated, in important part, upon an alleged dispute as to the interpretation and application of Article 26 of the collective bargaining agreement between L&N and BLF&E as the recognized representative of the craft or class of locomotive firemen," and concluded "that as to that aspect of the complaint this case involves a controversy, the determination of which is within the primary jurisdiction of the NRAB" (No. 18,479, A.57a). The court's statement referred to the allegations of paragraphs 11 and 12 of the complaint (No. 18,479, A. 9a-10a), by which the Firemen's Union asserts that all locomotive engineers must come exclusively from the ranks of fire-

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U.S. 239 (1950). Consistent therewith, this Court more recently found that a jurisdictional work-assignment dispute involving the interpretation and application of the bargaining agreements of competing unions was subject to compulsory arbitration in a single proceeding before the Adjustment Board. *Transportation-Communication Employees Union v. Union Pacific R. Co.*, 385 U. S. 157 (1966).

Under the above premises, the jurisdictional dispute herein, whether or not related to craft composition, is left for resolution by the proper administrative agencies, not the courts. And the court below so found. The Engineers' Union submits that the decision below was correct.

In *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323 (1943), the Engineers' Union brought an action seeking to have declared invalid an agreement between the Firemen's Union and the carrier, which concerned the same contractual provisions involved in the instant dispute. As does the Firemen's Union in the instant case, the Engineers' Union asserted that the acts of the former union and the carrier violated the provisions of section 2 of the Act. The Engineers also relied upon the *Clerks* case

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men, *i.e.*, individuals who had become engineers by promotions from the ranks of firemen on the L&N or some other railroad. If that were true, it does not appear on the face of Article 26, for the wording would merely indicate the setting up of a ratio of one fireman to be promoted to engineer for every employee hired directly in the craft of locomotive engineers. Thus, whether or not the respective collective bargaining agreements of the two unions require all engineers to be promoted firemen is a dispute involving the interpretation and application of those agreements and comes within the province of the Adjustment Board. In addition, under the Firemen's theory, the minority union would govern as to one of the basic areas for the craft of engineers. In effect, this would be a denial of the Engineers' rights as certified bargaining representative. See *Order of Ry. Conductors & Brakemen v. Switchmen's Union*, 269 F. 2d 726 (5th Cir. 1959), *cert. denied*, 361 U.S. 899 (1959).

and the *Virginian Railway* case. However, the Court, in holding the courts without power to decide the controversy, said:

> "It is our view that the issues tendered by the present litigation are not justiciable—that is to say that Congress by this Act has foreclosed resort to the courts for enforcement of the claims asserted by the parties." *Id.* at 327-28.

On the same day, this Court decided another dispute between the two unions involved herein. In part, the case contained the same facts as in the *M-K-T* case. However, there was an additional facet concerning the validity of an agreement obtained by the Firemen's Union to represent engineers in the handling of grievances. Once again, as does the Firemen's Union here, the Engineers argued that section 2, Third and Fourth prohibited the carrier from influencing employees in their choice of representatives. As does the Firemen's Union here, the Engineers contended that the action of the carrier would in effect coerce and interfere with its employees' selection of their union. Nevertheless, in finding that the courts had not been entrusted with the task of resolving these controversies, this Court stated that it saw "no reason for differentiating this jurisdictional dispute from the others." *General Committee v. Southern Pacific Co.*, 320 U. S. 338, 344 (1934).

The Firemen's Union, now reversing its position from that taken in the above authoritative cases, is necessarily requesting this Court to reject its prior decisions therein. However, no justification is given or reason advanced in support of a reversal of those long established holdings.

That the decision below is correct has also been the position of the National Mediation Board as set forth by the Department of Justice in its brief in *National Mediation Board v. Brotherhood of Locomotive Engineers*, Case

No. 22,185 (D.C. Cir.), *appeal pending* from 284 F. Supp. 344 (D.D.C. 1968). There, the Board said (Br., pp. 43-44):

> "The result reached by the Sixth Circuit seems correct and wholly consistent with our position; the courts clearly do *not* have jurisdiction to make the determinations apparently requested. See *General Committee v. Missouri-K.-T. R. Co.*, 320 U.S. 323. * * * The Sixth Circuit's holding on the latter point [the scope of section 2, Ninth] instead simply follows the Supreme Court's ruling in *General Committee v. Missouri-K.-T. R. Co., supra,* that whether or not the dispute falls within § 2, Ninth, its merits are not for the courts to resolve." [10] (Emphasis in original; brackets supplied.)

2. The decision of the court of appeals was in accord with previous decisions of that circuit and the other courts of appeal. In the opinion below, the court followed its decision in *Brotherhood of Ry. & S. S. Clerks v. United Air Lines,* 325 F. 2d 576 (6th Cir. 1963), wherein the court broke through form (allegations of section 2 violations) to substance and found that the facts involved a representation dispute within the NMB's jurisdiction.[11] The court in *United Air Lines* stated:

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[10] The above statement by NMB is clearly contrary to the petitioners' assertion of the NMB's position with respect to this case (Pet., p. 20). The above quotation on behalf of the Board appears to be entirely consistent with its present view in the instant dispute as expressed in its brief to the Courts of Appeals. There NMB seems to adopt as to its powers or function in this dispute a "wait-and-see" approach, *i.e.*, both the Engineers' and Firemen's Unions may bargain over the particular problem involved until such time as the number and terms of apprentice engineer agreements, whether 5 or 105, provide sufficient information for the Board to decide which craft should include apprentice engineers and which union should, therefore, represent those apprentices (Br., pp. 16-35).

[11] This Court initially granted certiorari (377 U.S. 903). The Solicitor General filed an amicus curiae brief, which argued that

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> "Regardless of what action may have been taken or may hereafter be taken by the National Mediation Board in this dispute, it is our opinion that the District Court was correct in holding that it did not have jurisdiction." *Id.* at 579.

This view obviously emanated from the following comment contained in this Court's opinion in the *M-K-T* case:

> "There may be as a result many areas in this field where neither the administrative nor the judicial function can be utilized." 320 U.S. at 337.

In so ruling, the decision below is consistent with all of those decisions of other circuits, which this respondent has been able to find on the same subject. In *Division 14, Order of R. R. Telegraphers v. Leighty,* 298 F. 2d 17 (4th Cir. 1962), *cert. denied,* 369 U. S. 885 (1962), the Fourth Circuit held that an intra-union jurisdictional dispute as to the integration of seniority of employees represented by the plaintiff local union was a representation dispute within the exclusive jurisdiction of the NMB. In *Howard v. St. Louis—S. F. Ry. Co.,* 361 F. 2d 905 (8th Cir. 1966), *cert. denied,* 385 U. S. 969 (1966), the Eighth Circuit held, despite allegations of section 2 violations and the NMB's refusal to decide the dispute, that only the NMB had the power under the Act to resolve the incipient questions of craft or class determination and that, therefore, claimants were precluded from resorting to the federal courts for resolution of their disputes. In *Southern Pacific Co. v. Switchmen's Union,* 356 F. 2d 332 (9th Cir. 1966), the Ninth Circuit, in a surprisingly similar case to

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the Sixth Circuit's decision "runs counter to the Board's construction of its own jurisdiction under the Railway Labor Act" (No. 17,588, A. 36b-37b), and urged reversal of the lower court's decision. Having considered the briefs submitted by the parties and the Solicitor General, this Court dismissed the writ of certiorari as being improvidently granted (379 U. S. 26).

the one at bar, found the basic or threshold question of representation and jurisdictional authority of the competing unions to fall within the exclusive province of the NMB. Using language fully applicable to this case, the court of appeals stated:

> "SUNA apparently feels the need to extricate itself from what it now regards as an outmoded, unreasonable and discriminatory craft classification. It pictures itself as involved in a fight against ultimate craft extinction, based not upon the fact that technical advances have eliminated the need for work it performs but rather upon the fact that existing craft lines are no longer appropriate. If so, it would seem that the resolution of its problems falls within the adjudicatory jurisdiction of the Mediation Board under Section 2, Ninth. That section, in providing for the certification of bargaining representatives, would seem necessarily to encompass the essential preliminary steps of fixing craft lines and of resolving any inter-union disputes in that respect." *Id.* at 335.

And in *Ruby v. American Airlines*, 323 F. 2d 248 (2nd Cir. 1963), *cert. denied*, 376 U.S. 913 (1964), the Second Circuit refused to grant the Air Line Pilots Association injunctive relief to prevent an air carrier and a committee of pilots, which became the nucleus of a new union, from dealing with one another and to require the airline to bargain with the Association. Although there was evidence that the air carrier had offered economic inducements to cause its pilots to desert the Association, the court of appeals affirmed the decision on summary judgment which dismissed the complaint for want of jurisdiction over the subject matter. Relying on this Court's holdings in the *M-K-T* and *Southern Pacific* cases, that court found that the action concerned the proper representation of the airline's pilots, a subject which Congress conferred the exclusive duty upon the NMB to determine.

Petitioners' contention that the ruling below conflicts with the Fifth Circuit's decision in *United Industrial Workers v Galveston Wharves,* 351 F. 2d 183 (1965), is unavailing (Pet., p. 15). First, unlike the above cited authorities, that case did not present a jurisdictional dispute wherein the real adversaries were two unions. Second, it is submitted that, on the facts of the instant case, the Fifth Circuit would have followed an earlier decision rendered by it in *Order of Ry. Conductors & Brakemen v. Switchmen's Union,* 269 F. 2d 726 (5th Cir. 1959), *cert. denied,* 361 U.S. 899 (1959). In the latter case, the Fifth Circuit held that a collective agreement between the railroad and the switchmen's union giving yard work to yardmen was valid, since that union had been certified as the exclusive bargaining representative for yard work by the NMB. Therefore, that court would have found in the instant situation that the Engineers' Union, as certified representative of the craft of locomotive engineers on the L&N, has the exclusive prerogative to bargain on the subjects of hiring, seniority and work in the engineers craft, even though these matters affect the work performed and the seniority of engineers belonging to the Firemen's Union; and that the complaint herein did not present a controversy to be decided by the courts.

In sum, the decisions of the various courts of appeals consistently apply the rationale expressed by the lower court in the instant case.

3. This case is not an appropriate vehicle for determining the statutory duties of the National Mediation Board. In fact, the instant decision is not dependent upon resolution of the scope of jurisdiction given the NMB under section 2, Ninth of the Act, as raised by the petitioners (Pet., pp. 18-21). Although the opinion below mentions the NMB, the holding therein is merely that the

present controversy is a jurisdictional dispute, which may not be resolved by the courts. The teachings of this Court have clearly been that the courts do not have that function.

The extent of the NMB's duties under section 2, Ninth and the power of the courts to determine those duties and to require the NMB to perform them are issues that need not be decided in the instant case. Whether this Court need ever give its attention to those questions should await consideration in a case where they are properly and directly raised. The Court has already determined that the NMB's actions are reviewable to the extent necessary to determine whether the Board performed its statutory duty under section 2, Ninth. *Brotherhood of Ry. & S.S. Clerks v. Non-Contract Employees Association,* 380 U.S. 650 (1965). However, if the specific questions posed may later require some action of the Court, they may more appropriately be considered, if at all, in *National Mediation Board v. Brotherhood of Locomotive Engineers, supra,* pp. 21-22.

Therefore, the determination by the court of appeals that there was a jurisdictional dispute between the two unions, which the courts may not decide, raises no novel or important issue which warrants review by this Court. The case involves a factual situation, fully canvassed by by the court below, which is governed by long established legal precedent.

CONCLUSION.

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

HAROLD A. ROSS,
ROSS & KRAUSHAAR,
730 Standard Building,
Cleveland, Ohio 44113,

CHAS. I DAWSON,
RICHARD W. ILER,
BULLITT, DAWSON & TARRANT,
1700 Kentucky Home Life Building,
Louisville, Kentucky 40202,

Counsel for Respondent
Brotherhood of
Locomotive Engineers.